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The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions

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THE CAUSATION FALLACY: *BAKKE* AND THE BASIC ARITHMETIC OF SELECTIVE ADMISSIONS

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Last Term, the Supreme Court turned down two invitations to resolve the constitutionality of affirmative action in college and university admissions. In May 2001, the Court for the second time declined to review a Fifth Circuit decision holding that the use of racial preferences to achieve diversity in the student body serves no compelling interest.[1] A few weeks later, the Court let stand a conflicting Ninth Circuit decision that upheld a law school affirmative action policy on the ground that "educational diversity is a compelling governmental interest that meets the demands of strict scrutiny."[2] The legal controversy over admissions preferences intensified in August 2001 when the Eleventh Circuit invalidated the University of Georgia's undergraduate affirmative action policy on the ground that it was not narrowly tailored.[3] With the Sixth Circuit's recent decision upholding the University of Michigan Law School's affirmative action policy[4] and yet another ruling expected soon,[5] the debate will soon come to a full boil. Facing an array of divergent lower court opinions on the issue, the Supreme Court may well decide in the next few months that the time for a final resolution has come.

Although the most recent legal challenges to racial preferences in university admissions vary in their details, they are unified by a common narrative — the same narrative that animated Allan Bakke's law-

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1. *See* Hopwood v. Texas, 236 F.3d 256, 274-75 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2550 (2001); Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996); *see also* Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998) (suggesting in dicta that diversity may never constitute a compelling interest).

2. Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1201 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001); *see id.* at 1200 n.9 (acknowledging *Hopwood* as "contrary" authority, but rejecting it as "flaw[ed]").

3. *See* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1254 (11th Cir. 2001).

4. Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

5. Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (upholding affirmative action in University of Michigan undergraduate admissions policy), appeal docketed, Nos. 01-1333, 01-1416, 01-1418 (6th Cir. Mar. 27, 2001).

suit against the Davis Medical School over twenty years ago.[6] Bakke won admission to the medical school after convincing the Supreme Court that the school's practice of setting aside sixteen out of 100 seats in each incoming class for minority students was an unconstitutional racial quota. The record shows that Bakke was, in fact, a highly qualified applicant. His undergraduate grades and standardized test scores were excellent, far better than the averages for minority students admitted through the set-aside. Yet the medical school rejected Bakke's application, even as it admitted minority applicants in numbers large enough to fill the sixteen-seat quota. This prompted Bakke to complain that affirmative action cost him a letter of admission, and the success of his lawsuit confirms what so many people find unfair about affirmative action: By according substantial preferences to minority applicants, affirmative action causes the displacement of deserving white applicants like Allan Bakke and the plaintiffs now following in his footsteps.[7]

This Article argues that the perceived unfairness is more exaggerated than real. The perception is a distortion of statistical truth, premised on an error in logic. There is strong evidence, as Bakke's story suggests, that minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action. But that fact provides no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action. To draw such an inference, as opponents of affirmative action routinely do, is to indulge what I call "the causation fallacy" — the common yet mistaken notion that when white applicants like Allan Bakke fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action.

The causation fallacy reflects white anxiety over the intensely competitive nature of selective admissions,[8] and it undoubtedly ac-

6. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

7. Although I use the term "minority" to label applicants who benefit from affirmative action and the term "white" to label those who do not, I recognize that some minority applicants do not benefit from affirmative action and that some affirmative action programs may benefit disadvantaged whites. Given this reality, it is probably more precise to use the generic terms "preferred" and "nonpreferred" applicants. But I stick to the terms "minority" and "white" in order to track the usage in common discourse on affirmative action. As Bakke's claim demonstrates, that discourse typically characterizes affirmative action as pitting minority applicants against white applicants in a deep racial conflict. This Article is an attempt to explain and dispel that characterization.

8. The intense competition among selective institutions for academically talented students is a relatively recent phenomenon in American higher education, largely driven by economic, social, legal, and demographic forces that have conspired over the last century to make educational opportunity more desirable and more attainable for an expanding majority of the citizenry. *See generally* NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (1999). Until the mid-1900s, elite colleges such as Harvard, Yale, and Princeton "educated the solid, if less industrious, members of

counts for much of the moral outrage that affirmative action inspires among unsuccessful white applicants. It was widely reported, for example, that what prompted Jennifer Gratz to become the lead plaintiff in a major test case challenging the University of Michigan's use of racial preferences in undergraduate admissions was her overriding sense that she had been displaced by less qualified minority applicants.[9] Observers of politics will recall a 1990 television commercial that depicted the plight of applicants like Bakke and Gratz by showing a pair of white hands crumpling a letter informing the recipient he had lost a job to a minority applicant. "You needed that job," the voice-over said. "And you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair?"[10] Michael Lind, an otherwise thoughtful commentator on the subject, has said that "[i]n order to accommodate a few less-qualified black students, the University of Texas Law School, like other leading law schools, must turn down hundreds or thousands of academically superior white students

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America's upper-middle and upper classes, [then] almost exclusively WASP. . . . Academic requirements were modest; students of good character who could pay the tuition were usually admitted." MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970, at 4 (1979). At Princeton, for example, "[i]n 1958, about 70 percent of alumni son applications were accepted for the class of 1962, as against only 35 percent of those without Princeton connections." *Id.* at 221.

> An alumni son was not required "to compete against non-Princeton sons," but was admitted if his "character record [was] satisfactory" and if the committee could answer just one major question in the affirmative: "*Can he be expected to graduate?*" The fruits of such preference were seen in the freshman class admitted in 1957: "50% of the bottom quarter, academically speaking, was made up of Princeton sons."

Id.; *see also id.* at 206 ("[A]lumni sons, who were, on the whole, economically and socially upper-middle-class and 'scholastically average' . . . made up about 20 percent of [Harvard's] class of 1951.").

It is perhaps unremarkable that criticism of affirmative action has intensified as elite schools have become more selective. *See, e.g.*, Stanley Rothman & Amy E. Black, *Who Rules Now? American Elites in the 1990s*, SOC'Y, Sept. 1, 1998, at 17 (reporting survey result that "while in 1980, very few whites (less than one in twenty) expressed the view that minority gains came at the expense of whites, almost half our white respondents support that view now"). What is remarkable, however, is evidence that even with affirmative action, the average SAT score of black matriculants at selective schools in 1989 was *higher* than the average for all matriculants at such schools in 1951. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 30 (1998). Such data put the current affirmative action debate into proper historical perspective. *See id.* ("The alumni/ae of the 1950s should have no reason to question the qualifications of the black students of today!").

9. Ethan Bronner, *Group Suing U. of Michigan Over Diversity*, N.Y. TIMES, Oct. 14, 1997, at A24 ("I knew of people accepted to Ann Arbor who were less qualified, and my first reaction when I was rejected was, 'Let's sue,' . . . . ") (quoting Jennifer Gratz); Jodi S. Cohen, *Affirmative Action on Trial; Denial Shatters Dream; Southgate Woman Key Figure in University Bias Suit*, DETROIT NEWS, Nov. 12, 2000, at A1 (profile of Jennifer Gratz); *see also* Kenneth J. Cooper, *Deciding Who Gets In and Who Doesn't; Schools Consider Many Factors, From Grade Average to 'Get Up and Go'*, WASH. POST, Apr. 2, 2000, at A5.

10. Peter Applebome, *Subtly and Not, Race Bubbles Up as Issue in North Carolina Contest*, N.Y. TIMES, Nov. 2, 1990, at A1 (quoting television commercial).

every year."[11] And a recent national survey confirms that affirmative action remains highly unpopular among whites in part because of perceptions of increased competition with minorities for employment and educational opportunities.[12]

Yet the powerful appeal of the causation fallacy is all the more reason for courts and commentators to purge it from moral and legal discourse on affirmative action, especially as the current spate of anti-affirmative action lawsuits percolates up to the Supreme Court. At its core, the fallacy erroneously conflates the magnitude of affirmative action's instrumental benefit to minority applicants, which is large, with the magnitude of its instrumental cost to white applicants, which is small. While not the first to observe the arithmetic error at the root of the fallacy,[13] this Article is the first to give the error a name, to expose the genesis of this error in *Bakke*, and to examine its implications for the standing of white plaintiffs and the merits of their claims. What this Article demonstrates is that the causation fallacy, by unduly magnifying the practical harm suffered by white applicants, stands in the way of any rational effort to evaluate the fairness of affirmative action.

At the outset, I wish to make clear what this Article does not do. It does not definitively resolve the constitutionality of affirmative action, nor does it prove the ultimate fairness or worthiness of affirmative ac-

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11. MICHAEL LIND, THE NEXT AMERICAN NATION 166 (1995) (citing Lino Graglia, *Racial Preferences in Admission to Institutions of Higher Education*, *in* THE IMPERILED ACADEMY 134 (Howard Dickman ed., 1993)). The careful reader will note that Lind's assertion flatly defies basic arithmetic.

12. *See* Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST, July 11, 2001, at A1. This Article does not address affirmative action in the employment context. Instead, it focuses exclusively on the use of racial preferences in the admissions processes of selective colleges and universities. Although the Article's main statistical argument is applicable to most educational contexts where race is a factor in selective admissions, its applicability is more variable in the context of employment. The reason is that the relative magnitudes of the pertinent statistical parameters (e.g., spaces available, number of minority applicants, number of total applicants) are not as consistent across employment opportunities as they are across educational opportunities where race is a factor in selection. *See infra* note 76 (discussing evidence that race is a significant factor in admissions only at the most selective schools).

13. *See, e.g.*, Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, *in* THE BLACK-WHITE TEST SCORE GAP 453-54 (Christopher Jencks & Meredith Phillips eds., 1998); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 422-23 n.192 (1998); Andrew Hacker, *The Myths of Racial Division*, GUARDIAN, May 1, 1992, at 19 (analyzing ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992)) ("[I]n the end black Americans remain a relatively small minority, so there are limits to how many whites they can displace even with aggressive affirmative action recruiting."); John Iwasaki, *Affirmative Action Aids White Students Too; Stereotype False, State Study Says*, SEATTLE POST-INTELLIGENCER, Nov. 19, 1995, at A9 ("[M]any white students who were denied admission did not lose out because of minority students, but because of tight limits on enrollment. In other words, many qualified white applicants probably would have been turned down even if no minority students had applied."); Gary Orfield, *Boston Needs to Strengthen its Case for Diversity at Latin School*, BOSTON GLOBE, Jan. 11, 1999, at A15 ("[W]hites tend to overestimate what they actually 'lose' through affirmative action . . . .").

tion as a matter of social policy. Grand ambitions of this sort are difficult to accomplish given the strength of the arguments and the depth of feelings on both sides of the debate. At the same time, I do not claim immunity from the pressure to be either "for" or "against" affirmative action;[14] indeed, I have made no mystery of where my sympathies lie.[15] But this Article, by design, has a limited scope. I have chosen to focus on a specific strand of argument made by white applicants who oppose racial preferences in an attempt to loosen the grip that argument has had on the affirmative action debate. My effort begins with a showing that *Bakke*, as a story about how affirmative action affects white applicants, is wrong both on its own facts and as a broadly representative narrative. That showing, which exposes the causation fallacy, does not conclusively resolve whether affirmative action is fair or unfair to white applicants. But it does enable us to engage that question in more lucid, more rigorous, and less polarizing terms.

This Article has four parts. Parts I and II demonstrate that the causation fallacy defies the basic arithmetic of selective admissions. My argument proceeds from one simple statistical truth: In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants. Part I develops this argument by showing that the racial quota in *Bakke*, though a substantial benefit to minority applicants, was not likely the sole or even the primary reason for Bakke's rejection. His success in winning an order of admission from the Supreme Court, it turns out, was attributable not to the likelihood of his admission had there been no racial quota, but to a little-known procedural quirk barely acknowledged in Justice Powell's opinion and rarely if ever mentioned in commentary. Part II corroborates this analysis of *Bakke* with similar findings based on undergraduate admissions data from William Bowen and Derek Bok's comprehensive study of affirmative action, *The Shape of the River*.[16] These findings and the logic behind them show that the admission of minority applicants and the rejection of white applicants are largely independent events, improperly linked through the causation fallacy.

Parts III and IV examine the legal implications of dispelling the causation fallacy. Part III begins with the recognition that, absent the causation fallacy, white applicants have legitimate grounds for claim-

14. *See* Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 862 (2000) (noting the difficulty of "sustain[ing] an intermediate position that is sympathetic and skeptical at once" in light of "the pressure to be 'for' or 'against' affirmative action without reservation").

15. *See* Liu, *supra* note 13.

16. BOWEN & BOK, *supra* note 8.

ing that affirmative action prevents them from competing on an equal footing with minority applicants. Such a claim, which is distinct from a claim of displacement, establishes a cognizable equal protection injury. Importantly, however, not all white applicants are positioned to raise an equal-footing claim. When the mechanics of selective admissions are analyzed at the level of individual applicants, it becomes clear that a substantial number of unsuccessful white applicants (somewhere close to half in Bowen and Bok's study) are too weak to be admitted even when placed on an equal footing with minority applicants. Because the failure of those applicants to gain admission has nothing to do with race, they lack standing to challenge affirmative action. Among the remaining white applicants, all have standing to raise an equal-footing claim, but under current law, most are not entitled to sue for damages or other retrospective relief. Only the tiniest fraction of unsuccessful white applicants genuinely conforms to the *Bakke* narrative, and there is reason to believe that such highly qualified applicants make unlikely plaintiffs.

Finally, Part IV discusses the implications of the causation fallacy for evaluating the constitutional merits of affirmative action. Because strict scrutiny takes into account the nature and severity of the burden that affirmative action imposes on white applicants, it is essential to characterize that burden accurately, without the distorting influence of the causation fallacy. Moreover, exposing the causation fallacy has the salutary effect of centering the merits inquiry on whether white applicants are improperly stereotyped, not displaced, by affirmative action. Claims of displacement tend to inflate the degree of racial conflict inherent in race-conscious admissions, thereby heightening the pressure to be "for" or "against" affirmative action. In contrast, the stereotyping concern defuses the tendency toward polarization by relating the fairness of affirmative action to the concrete workings of particular policies.

I. *BAKKE* REVISITED

Let us begin with a familiar story. In 1973, a white student named Allan Bakke applied unsuccessfully for admission to the Davis Medical School at the University of California. Bakke reapplied in 1974 and was again turned down. At the time, the medical school enrolled 100 new students each year and operated a two-track admissions process consisting of a general admissions program, under which Bakke's application was reviewed, and a special admissions program, under which various minority applicants could seek review.[17] The spe-

17. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 274-76 (1978) (opinion of Powell, J.). The medical school's formal policy indicated that any applicant who identified herself or himself as "economically and/or educationally disadvantaged" could seek review under the special admissions program. *Id.* at 272 n.1. In fact, large numbers of disadvantaged whites

cial program screened minority applicants to fill a quota; it continually recommended applicants to the general admissions committee until sixteen were admitted.[18] Before the Supreme Court, Bakke argued that the "racial quota . . . prevented [him] from competing for 16 of the 100 places at the Davis Medical School and, as a result, barred him — by reason of race alone — from attending the school."[19]

Justice Powell agreed. As a preface to Bakke's legal claims, Justice Powell observed that "[i]n both years, applicants were admitted under the special program with grade point averages, [Medical College Admission Test] scores, and bench mark scores significantly lower than Bakke's."[20] To make this clear, he dropped a footnote showing the following table:[21]

CLASS ENTERING IN 1974

	Science GPA	Overall GPA	Verbal MCAT (%ile)	Quant. MCAT (%ile)	Science MCAT (%ile)
Bakke	3.44	3.46	96	94	97
Regular admittees	3.36	3.29	69	67	82
Special admittees	2.42	2.62	34	30	37

After finding the quota unconstitutional, Justice Powell affirmed the California Supreme Court's judgment ordering Bakke's admission.[22] The medical school had chosen not to contest Bakke's admissibility absent the quota,[23] and Justice Powell noted that "[h]ere . . . there is no question as to the sole reason for respondent's rejection — purposeful racial discrimination in the form of the special admissions

applied to the special program. *Id.* at 275 n.5. No whites, however, were ever admitted through the special program. *Id.* at 276 & n.6.

18. Competition within the special program was substantial. Even discounting the disadvantaged white applicants in the pool, the special program admitted only 7.1% of minority applicants (sixteen out of 224) in 1973 and only 3.5% of minority applicants (sixteen out of 456) in 1974. *Id.* at 275 n.5.

19. Brief for Respondent at 63, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

20. *Bakke*, 438 U.S. at 277.

21. *See id.* at 277 n.7. Allan Bakke also applied unsuccessfully in 1973, and the footnote includes a second table showing similar data for the class entering in 1973. The two tables in footnote 7 include a sixth column titled "Gen. Infor." I have omitted it because Justice Powell nowhere explains or relies on the data in this column.

22. *Id.* at 320.

23. *Id.*

program."[24] In other words, affirmative action cost Bakke his seat at the Davis Medical School.

What, if anything, is wrong with this story?

A. *An Introduction to the Causation Fallacy*

However neat and intelligible, the conventional rendition of *Bakke* defies common sense. The reason is clear upon a closer look at the table in Justice Powell's footnote. That table unambiguously shows that Bakke's academic qualifications were far better than those of the average special admittee. His MCAT scores placed him roughly in the top 5% of test-takers, whereas the average scores of the special admittees placed them in the bottom third.[25] Likewise, his science grade point average was more than one full point (one letter grade) higher than the average of the special admittees.[26] These large gaps strongly suggest that the special program afforded minority applicants a substantial preference in admissions.[27]

However, although Justice Powell notes these "significant[ ]" disparities,[28] he fails to point out what I find to be the most striking information in the table: Bakke's grade point averages and MCAT scores in 1974 were not only far better than those of the special admittees, but also significantly better than those of the *regular* admittees. Indeed, Bakke's academic indicators were high by any measure and, importantly, higher than those of the *majority* of applicants who gained admission under the regular program.[29]

How did these applicants get in ahead of Bakke? Clearly, the medical school admitted students not only on the basis of grades and test scores, but also on the basis of other factors relevant to the study and practice of medicine — effective communication skills, demonstrated compassion, commitment to a particular field of research, and perhaps others. From Justice Powell's opinion, we do not learn exactly what qualities the regular admittees had that Bakke lacked, although Justice Powell noted that the chairman of the admissions committee, who interviewed Bakke in 1974, "found Bakke 'rather limited in his approach' to the problems of the medical profession and found disturbing Bakke's 'very definite opinions which were based more on his

24. *Id.* at 321 n.54.

25. *See id.* at 277 n.7.

26. *Id.*

27. *But cf. infra* text accompanying notes 83-86 (discussing why the use of averages to infer the magnitude of preference accorded to minority applicants is not entirely valid).

28. *Bakke*, 438 U.S. at 277.

29. *Id.* at 277 n.7. Although the grade point averages and test scores of regular admittees in footnote 7 are means, not medians, I think it is reasonable to assume that the admittees are normally distributed around each mean.

personal viewpoints than upon a study of the total problem.' "[30] The point is that many reasons, apart from racial preferences, might explain Bakke's failure to achieve a more competitive position relative to the fifty or more *regular* admittees with grades and test scores lower than his.[31]

To be sure, the sixteen-seat set-aside lowered Bakke's chance of admission. But by how much? One rudimentary way to think about this question is to compare (a) Bakke's likelihood of admission as an applicant for only the eighty-four seats available through the regular admissions program with (b) his likelihood of admission had he been able to compete for all 100 seats in the entering class. To simplify the comparison, let us assume that none of the special applicants would have been admitted ahead of any of the regular applicants.[32] In 1974, Bakke was one of 3109 regular applicants to the Davis Medical School.[33] With the racial quota, the average likelihood of admission among regular applicants was 2.7% (eighty-four seats divided by 3109 applicants). With no racial quota, the average likelihood of admission would have been 3.2% (100 seats divided by 3109 applicants).[34] In

30. *Id.* at 277 (quoting the record).

31. Neither Justice Powell's opinion nor the litigation record indicates exactly how many regular admittees had grades and test scores lower than Bakke's. Using the number of regular admittees who matriculated (eighty-four) as a lower bound for the number of regular applicants who were admitted, and assuming that the grade point averages and test scores of regular admittees are normally distributed around the mean, I estimate that fifty or sixty regular admittees, at a minimum, had grades and test scores lower than Bakke's. The true number is certainly much higher, because not all admittees choose to matriculate. But I am unable to estimate the true number reliably without knowing either the total number of applicants admitted under the regular program or the percentage of admittees who decided to matriculate.

32. This assumption is improbable despite the large gaps in average GPAs and MCAT scores between special and regular admittees. Special applicants at the high end of their distribution likely had GPAs and test scores at least as high as, if not higher than, those of regular applicants at the low end of their distribution. Indeed, the record shows that, whereas Bakke had an overall GPA of 3.46 and a science GPA of 3.44, *Bakke*, 438 U.S. at 277 n.7, the overall GPA of special admittees ranged up to 3.76 in 1973 and up to 3.45 in 1974, and the science GPA of special admittees ranged up to 3.89 in 1974, *see* Brief of Amici Curiae National Urban League et al. at 12 n.6, Regents of Univ. of Cal. v. Bakke, No. 76-811 (U.S. filed Jan. 14, 1977) (on petition for writ of certiorari) [hereinafter Amici National Urban League]. The assumption that none of the special applicants would have been admitted under the regular program thus establishes an upper bound for the cost of affirmative action to regular applicants like Bakke.

33. *See Bakke*, 438 U.S. at 273 n.2 (noting that 3737 applications were submitted for the 1974 entering class); *id.* at 275 n.5 (noting that 628 persons applied to the special committee in 1974). 3737 – 628 = 3,109.

34. I describe this comparison as rudimentary because it does not account for the fact that the medical school had to admit more than 84 or 100 applicants in order to obtain a "yield" of 84 or 100 matriculants. In other words, the average admission rates for white applicants — i.e., the likelihood of receiving a letter of admission — were higher than my rough calculations show, both with and without the quota. But without knowing the total number of admittees or the yield rates for the medical school, *see supra* note 31, I am unable to offer a more precise calculation. Part II of this Article, which examines undergraduate admissions data, provides a much more refined iteration of this method of statistical com-

other words, the quota increased the average likelihood of rejection among regular applicants from 96.8% to 97.3%.

Admittedly, this comparison is somewhat artificial because Bakke was clearly not an average applicant. However weak his interview may have been, his test scores and grade point averages gave him a substantial edge over the majority of regular applicants. We do not know exactly how much the admissions committee had narrowed the regular applicant pool before rejecting Bakke, but we do know that Bakke received an interview and that, under the regular admissions program, "[a]bout one out of six applicants was invited for a personal interview."[35] Thus, Bakke was one of roughly 520 regular applicants interviewed (3109 divided by six). Among these highly qualified applicants, the average rate of admission with the racial quota in place was 16.2% (eighty-four seats divided by 520 applicants). Without the quota, the average rate of admission would have been 19.2% (100 seats divided by 520 applicants).

Of course, with additional criteria, it may be possible to narrow down Bakke's competition to a small enough number that the effect of the quota turns out to be substantial. The point, however, is that without precise information about how Bakke's application fared in the overall pool — and Justice Powell's opinion provides none — no reasonable basis exists to infer that the racial quota, and not some other selection criterion, caused his application to be rejected. In a selection process where there are far more applicants than available opportunities, the likelihood of success for *any* candidate is low, even under race-neutral criteria. Reserving a small number of seats for minority applicants, relative to the total number of seats, will not decrease that low likelihood very much. Based on the data in Justice Powell's opinion, the most reasonable inference is that affirmative action did not appreciably affect Bakke's chance of admission.

B. *Discrimination Based on Race?*

Apart from its small size, the special admissions program had another feature that, while not typical of affirmative action policies in general, underscores the illogic of the causal narrative in *Bakke*. Although we have come to understand Davis's special program as a paradigmatic racial quota, the fact is that the program was officially designed to accord admissions preferences not on the basis of race, but on the basis of economic or educational disadvantage.[36] In the trial court, the chairman of the admissions committee described the special

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parison, including adjustments for yield. *See infra* Part II.

35. *Id.* at 273-74.

36. *Id.* at 274-75 & n.4.

program as an effort to " 'give[] preference to applicants from disadvantaged backgrounds, [using] minority group status as one factor in determining relative disadvantage,' "[37] and Justice Powell's opinion notes that seventy-three of the 297 special applicants in 1973 were white, and that 172 of the 628 special applicants in 1974 were white.[38] Yet no white student was ever admitted through the special program[39] — a fact that prompted the trial court to opine, correctly in my view, that "a white student who had applied for the special program and been refused purely on the basis of his race would have been in a much stronger position to question this practice than the plaintiff."[40] Bakke, the trial court found, "did not apply to [the] special program as a disadvantaged student,"[41] and he never claimed in his lawsuit that he qualified as disadvantaged.

It is thus doubly surprising that Bakke succeeded in attributing his failure to gain admission to racial discrimination. Not only is there no sound basis for inferring that the sixteen-seat set-aside caused Bakke's rejection, there is also no basis for believing that Bakke was excluded from the special program based on his race as opposed to his lack of disadvantage. Justice Powell, finding it was not "fatal to Bakke's standing that he was not a 'disadvantaged' applicant," determined that "[d]espite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element."[42] But disadvantaged white applicants were allowed to apply and did apply to the special program, and "[a]pplicants from minorit[y] [groups] but non-disadvantaged backgrounds [were] referred to the regular admissions process."[43] Had Bakke claimed disadvantage and applied to the special program, he would have had a legitimate claim of race discrimination. Yet on the facts of his case, Bakke's claim of race discrimination seems inapposite. Being nonwhite by itself would not have qualified him for special consideration, and Bakke adduced no facts indicating that he was economically or educationally disadvantaged. In short, Bakke's exclusion from the special program

37. Notice of Intended Decision at 87a, Bakke v. Regents of Univ. of Cal. (Cal. Super. Ct. Nov. 25, 1974) (No. 31287) (on file with author) (quoting Dr. George H. Lowrey) [hereinafter Intended Decision]. The Intended Decision is reproduced in the appendix to the university's petition for certiorari to the U.S. Supreme Court. *See* Regents of Univ. of Cal. v. Bakke, No. 76-811 (U.S. filed Dec. 14, 1976) (on file with author). The page citations refer to that appendix.

38. *Bakke*, 438 U.S. at 275 n.5.

39. *Id.* at 276.

40. Intended Decision, *supra* note 37, at 94a.

41. *Id.*

42. *Bakke*, 438 U.S. at 281 n.14 (opinion of Powell, J.).

43. Intended Decision, *supra* note 37, at 88a. In fact, as Justice Powell acknowledged, fifteen minority applicants were admitted through the regular program in 1973, and nine were admitted through the regular program in 1974. *Bakke*, 438 U.S. at 276 n.6.

was no more a consequence of racial discrimination than it was a consequence of discrimination on the basis of disadvantage.

C. The Real Story of Allan Bakke's Admission to the Davis Medical School

Assuming that Bakke stated a valid claim of race discrimination, it remains difficult to see how Justice Powell could have concluded that there was "no question" that the sixteen-seat set-aside was the "sole reason" for Bakke's rejection.[44] As shown above, the sheer numerical parameters of the admissions process and the relevance of selection criteria other than grades and test scores do not support that conclusion. It must be remembered, however, that Justice Powell reached his conclusion only after observing that the medical school "ha[d] conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, [Bakke] still would not have been admitted."[45] This raises an important question: If the statistical analysis above is at all compelling, then why did the university concede the issue of Bakke's likelihood of admission absent affirmative action? Did the reservation of sixteen seats actually affect Bakke's odds of admission to a much greater extent than my statistical argument suggests? The answer, it turns out, makes for an interesting tale about the university's litigation strategy but does nothing to shore up the fallacy in Bakke's causal argument.

In his original complaint in state court, Bakke sought an injunction "directing defendants to admit plaintiff to said Medical School."[46] The university's answer asserted unequivocally: "Petitioner was not denied admission to the Davis Medical School as a result of the operation of the special admissions program at said school. Petitioner would not have been admitted to said school even if there had been no such special admissions program."[47] After a bench trial, the state court concluded that the special admissions program was unconstitutional but declined to order Bakke's admission.[48] The trial court's findings of fact state that in both 1973 and 1974 "[p]laintiff would not have been accepted for admission . . . even if there had been no special admissions

44. *Bakke*, 438 U.S. at 320 n.54.

45. *Id.* at 320.

46. Complaint at 4, Bakke v. Regents of Univ. of Cal. (Cal. Super. Ct. June 20, 1974) (No. 31287) (on file with author).

47. First Amended Answer at 7, Bakke v. Regents of Univ. of Cal. (Cal. Super. Ct. Aug. 1, 1974) (No. 31287) (on file with author).

48. *See* Findings of Fact and Conclusions of Law at 117a, Bakke v. Regents of Univ. of Cal. (Cal. Super. Ct. Mar. 7, 1975) (No. 31287) (on file with author). The Findings of Fact and Conclusions of Law are reproduced in the appendix to the university's petition for certiorari, and the page numbers refer to that appendix.

program."[49] In support of this finding, the court noted that Bakke "was not put on the alternate list" in 1973 or 1974, that "few of those on the alternate list were accepted" in either year, and that in 1974 thirty-two applicants with ratings higher than Bakke's, including twenty on the alternate list, had not been admitted.[50] Moreover, the chairman of the admissions committee, Dr. George Lowrey, had testified that "Mr. Bakke would not have been admitted in either year even if there had been no special admissions program."[51]

On appeal, the California Supreme Court agreed that the special admissions program was unconstitutional.[52] The court additionally held, however, that the trial court should have assigned the university, not Bakke, the burden of proof on the issue whether Bakke would have been admitted absent the special program.[53] Facing a remand on that issue,[54] the university filed a petition for rehearing in which it stipulated that it would not attempt to meet its burden of proof.[55] While stating — contrary to its earlier position and contrary to the trial court's findings — that "Mr. Bakke was a highly qualified applicant and came extremely close to admission in 1973 even with the special admissions program being in operation,"[56] the university went on to offer the following explanation for its stipulation:

> Further, in the event [the California Supreme Court] adheres to its decision on the constitutional issue, the University has a strong interest in obtaining review by the United States Supreme Court of the question of whether the special admissions program at the Davis Medical School and other similar programs are . . . unconstitutional. *It is far more important for the University to obtain the most authoritative decision possible on the legality of its admissions process than to argue over whether Mr. Bakke would or would not have been admitted in the absence of the special admissions program.* A remand to the trial court for determination of that factual issue might delay and *perhaps prevent review* of the constitutional issue by the United States Supreme Court.[57]

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49. *Id.* at 116a-117a.

50. *Id.* at 116a.

51. Intended Decision, *supra* note 37, at 108a (quoting Dr. Lowrey).

52. Bakke v. Regents of Univ. of Cal., 553 P.2d 1152, 1172 (Cal. 1976).

53. *Id.*

54. In its original disposition of the case, the California Supreme Court said: "[W]e remand the case to the trial court for the purpose of determining, under the proper allocation of the burden of proof, whether Bakke would have been admitted to the 1973 or 1974 entering class absent the special admission program." *Compare Bakke*, 553 P.2d at 1172, *with* Modification of Opinion at 80a, *Bakke*, 553 P.2d 1152 (S.F. 23311) (Cal. Oct. 28, 1976). The Modification of Opinion is reproduced in the appendix to the university's petition for certiorari, and the page number refers to that appendix.

55. Petition for Rehearing at 11, *Bakke*, 553 P.2d 1152 (S.F. 23311) (Cal. Sept. 30, 1976).

56. *Id.*

57. *Id.* at 11-12 (emphasis added).

The California Supreme Court accepted the stipulation and, instead of remanding the case to the trial court, amended its disposition of the case to state that Bakke "is entitled to an order that he be admitted to the University."[58]

The record of litigation thus shows that the university's concession was a last-minute switch on the eve of seeking certiorari. Eager for a definitive resolution of the constitutional issue, the university candidly acknowledged that proof of Bakke's inadmissibility might cast doubt on his standing and, in turn, the Supreme Court's Article III jurisdiction.[59] Indeed, when the university filed its petition for certiorari, a coalition of fifteen civil rights groups, bar associations, and unions submitted an amicus brief opposing certiorari on the ground that the university's stipulation was "an [e]ffort to [f]abricate [j]urisdiction" in the Supreme Court.[60] As that brief makes clear, ample facts were available to the university to show that Bakke would have been denied admission in 1973 and 1974 even if all sixteen seats in the special program had been available. In 1973, at the time Bakke applied, fifteen regular applicants had numerical ratings higher than Bakke's, and among the twenty regular applicants with ratings equal to Bakke's, some were put on a waiting list, yet Bakke was not.[61] In 1974, twenty applicants were on the waiting list (again, Bakke was not), and twelve additional applicants not on the waiting list had numerical ratings higher than Bakke's.[62] Thus, in both years, more than sixteen applicants had priority over Bakke.[63]

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58. *Bakke*, 553 P.2d at 1172; Modification of Opinion, *supra* note 54, at 80a.

59. The university had reason to be concerned about justiciability. Just three years before *Bakke* reached the Supreme Court, the Court dismissed as moot a similar lawsuit against the University of Washington Law School. DeFunis v. Odegaard, 416 U.S. 312 (1974). Moreover, a mere six months before the university filed its petition for certiorari, the Court had held that, absent a showing that "plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision," a federal court lacks Article III jurisdiction. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

60. Amici National Urban League, *supra* note 32, at 13.

61. *Id.* at 11-12. The numerical ratings, called "benchmark scores," were composite ratings of "the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the [MCAT], letters of recommendation, extracurricular activities, and other biographical data." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 274 (1978).

62. *See* Amici National Urban League, *supra* note 32, at 12.

63. The university made several arguments in response, none of them convincing. *See* Reply to Brief of Amici Curiae at 2-4, Regents of Univ. of Cal. v. Bakke, No. 76-811 (U.S. filed Jan. 21, 1977) (on petition for writ of certiorari) [hereinafter Reply]. First, it pointed out that "some offers of admission are declined" and that "the notion of inflexible 'priority' is itself inaccurate, for benchmark ratings were not wholly determinative of admission." *Id.* But these arguments are refuted by the testimony of Dr. Lowrey, the admissions committee chairman, who consistently maintained that Bakke would have been denied admission absent the quota. *See* Intended Decision, *supra* note 37, at 108a; Amici National Urban League, *supra* note 32, at 11. Dr. Lowrey explained that " '[a]lmost every applicant offered a place in the class after the middle of May [when Bakke's application was being considered]

The university's strategic move garnered little attention at the Supreme Court. Noting that "[s]everal *amici* suggest that Bakke lacks standing," Justice Powell simply stated without explanation that the university's stipulation was "not an attempt . . . to disguise actual facts of record,"[64] a conclusion difficult to square with the available evidence. He went on to clarify that "the University's decision not to permit Bakke to compete for all 100 places in the class" was a sufficient injury to establish standing "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program."[65] Yet this determination does not render the university's maneuver less suspect, for the university never advanced this theory of standing before the Supreme Court. It relied instead on the validity of its stipulation.[66] Justice Powell reached his conclusion about standing on his own, and the issue was not addressed by any other Justice in *Bakke*.

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attends the medical school,' " and he plainly characterized the fifteen applicants with benchmark ratings higher than Bakke's in 1973 as being "ahead of Mr. Bakke." Amici National Urban League, *supra* note 32, at 11 (quoting Dr. Lowrey).

The university also cited a statement by the trial court that " 'there appears to the court to be at least a possibility that [Bakke] might have been admitted absent the 16 favored positions on behalf of minorities.' " Reply, *supra*, at 3 (quoting Intended Decision, *supra* note 37, at 108a). But the university lifted this statement from a discussion in which the trial court concluded that Bakke would *not* have been admitted absent the special program, *see* Intended Decision, *supra* note 37, at 107a-108a, a conclusion unequivocally restated by the trial court twice thereafter, *see* Addendum to Notice of Intended Decision, Bakke v. Regents of Univ. of Cal. (Cal. Super. Ct. Mar. 7, 1975) (No. 31287) (on file with author); Findings of Fact and Conclusions of Law, *supra* note 48, at 116a-117a.

Finally, the university cited a report written by Dr. Lowrey in response to a Department of Health, Education, and Welfare inquiry. The report said:

> Mr. Bakke was found by the Admissions Committee to be a highly desirable candidate and came very close to being offered a place in the entering class for the fall of 1973. The single reason for his non-acceptance was the lack of available space in that group; had additional places been available, individuals with Mr. Bakke's rating would likely have been admitted. . . .

Reply, *supra*, at 4 n.2 (quoting report). But the reference to "that group" is a reference to "the entering class for the fall of 1973"; it is not a reference to the regular admissions program. The very most that could be inferred from the report's unremarkable citation to "the lack of available space" is that Bakke was in line for the 101st seat, not the 85th.

In sum, it was far from "an impossible burden," Reply, *supra*, at 4, to show Bakke's inadmissibility absent the quota by a preponderance of the evidence. The record supports the charge that "the University essentially gave up an air tight case in order to confer 'jurisdiction' on [the Supreme] Court." Amici National Urban League, *supra* note 32, at 16.

64. *Bakke*, 438 U.S. at 280 n.14.

65. *Id.* at 280-81 n.14.

66. In its reply to amici's concerns about standing, the university asserted that "the law does not require *certainty* of admission in order to establish standing." Reply, *supra* note 63, at 2 (emphasis added). But nowhere did the university argue that the denial of opportunity to compete for all 100 places was alone sufficient to establish standing. Rather, the university argued that Bakke's inadmissibility absent the racial quota was not a certainty, *see id.* at 2-3, and was sufficiently probable that attempting to prove otherwise would have amounted to "trying to carry an impossible burden," *id.* at 4.

In sum, Allan Bakke's admission to the Davis Medical School was a quirk, a result orchestrated in the course of litigation based on considerations unrelated to the merits of his causal claim. From the record of the lawsuit, the point worth emphasizing is not so much the ultimate fact of Bakke's inadmissibility absent the special program. The point, rather, is that Bakke's admissibility absent the special program would have been exceptional, and the university's concession provides no reason to believe otherwise. Bakke vindicated his claim that the "racial quota . . . barred him — by reason of race alone — from attending the school"[67] not only against the facts, but more importantly against overwhelming odds. For many unsuccessful white applicants, Bakke's example legitimizes the instinct — against all odds — to blame affirmative action. In this way, *Bakke* gives life to the causation fallacy. But with a careful look beneath the surface, we see the fallacy laid bare.

II. THE BASIC ARITHMETIC OF SELECTIVE ADMISSIONS

As a legal matter, *Bakke* held unlawful the voluntary use of racial quotas in selective admissions.[68] Yet the Court did not ban all uses of race in admissions. In his opinion announcing the judgment of the Court, Justice Powell famously pronounced that colleges and universities may use race as one of many "plus" factors in admissions in order to assemble a diverse student body.[69] Although the status of Justice Powell's opinion as legal authority is contested,[70] the notion of race as a "plus" factor has served for over twenty years as an organizing principle for the institutional practice and public understanding of affirmative action. The gold standard for such practice, according to Justice Powell, is the admissions program used by Harvard College, where "the race of an applicant may tip the balance in his favor just as geo-

67. Brief for Respondent at 63, Bakke v. Regents of Univ. of Cal., 438 U.S. 265 (1978) (No. 76-811).

68. *Bakke*, 438 U.S. at 315-16, 319-20 (opinion of Powell, J.) (finding the quota unconstitutional); *id.* at 412-18, 421 (Stevens, J., joined by Burger, C.J., Stewart & Rehnquist, JJ., concurring in the judgment in part and dissenting in part) (finding the quota unlawful under Title VI of the Civil Rights Act of 1964).

69. *Id.* at 316-18 (opinion of Powell, J.).

70. *Compare* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1200 (9th Cir. 2000) ("Justice Powell's analysis is the narrowest footing upon which a race-conscious decision making process could stand" and is therefore the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977)), *with* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) ("Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. . . . Justice Powell's view in *Bakke* is not binding precedent on this issue.").

graphic origin or a life spent on a farm may tip the balance in other candidates' cases."[71]

The appeal of this approach is readily understood in light of the conventional narrative of *Bakke*. Whereas racial quotas put a specified number of seats beyond the reach of white applicants, the use of race to "tip the balance" in close cases seems to impose a comparatively minor detriment. Quotas are bad, the argument goes, because they are rigid and because they expressly limit the number of opportunities for which white applicants may compete. In contrast, the plus-factor approach is flexible. It enables every applicant to compete for all available seats in the class. And against a baseline of objective qualifications, it places racial and nonracial plus factors "on the same footing for consideration, although not necessarily according them the same weight."[72] Justice Powell's opinion tells us that Bakke was right to believe that the medical school's racial quota cost him a letter of admission. Unlike Bakke, however,

> [t]he applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.[73]

In other words, when race is used as a plus factor, affirmative action cannot be said to have caused the rejection of a white applicant. Although race may be a pivotal factor at the end, it is only a minor consideration — a factor that "tips the balance" — against the backdrop of the objective and nonobjective "combined qualifications" of each white and minority applicant. So goes the conventional answer to the conventional framing of the problem in *Bakke*: Because the use of race in the form of a quota is understood to impose a heavy burden on white applicants like Bakke, the solution is to limit the use of race by reducing it to a mere tipping factor in close cases.

But this framing of the solution, no less than the framing of the problem, does not correspond to empirical reality. The practice and effects of affirmative action are not as transparent now as they were before *Bakke* made quotas illegal.[74] But recent scholarship and litigation provide important insights that are indicative of general tenden-

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71. *Bakke*, 438 U.S. at 316 (quoting description of Harvard College admissions program).

72. *Id.* at 317.

73. *Id.* at 318.

74. *See, e.g.*, Kenneth J. Cooper, *Colleges Testing New Diversity Initiatives: Success Is Uneven Without Traditional Affirmative Action*, WASH. POST, Apr. 2, 2000, at A4 (observing that more and more institutions are revising their admissions policies in response to changes in the legal and political landscape).

cies.[75] Perhaps the most notable contribution in this vein is *The Shape of the River* by William Bowen and Derek Bok, a comprehensive, longitudinal study of admissions, academic and employment outcomes, attitudes, and life experiences of over 80,000 black and white students who studied at twenty-eight selective colleges and universities.[76] Although Bowen and Bok's study, like all social science, is not perfect,[77] it is powerful enough to confirm, as we shall see, that race continues to play a major role in the admission of minority applicants, certainly a much larger role than the image of a tipping factor suggests.

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75. For recent scholarship, see, for example, Kane, *supra* note 13, at 431; Fredrick E. Vars & William G. Bowen, *Scholastic Aptitude Test Scores, Race, and Academic Performance in Selective Colleges and Universities*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra* note 13, at 457; Robert C. Davidson & Ernest L. Lewis, *Affirmative Action and Other Special Consideration Admissions at the University of California, Davis, School of Medicine*, 278 JAMA 1153 (1997); William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167 (2000); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997); and Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996). In addition, the University of Michigan litigation has yielded an impressive collection of empirical research demonstrating the relation between racial diversity and educational goals. *See* The Compelling Need for Diversity in Higher Education *at*, http://www.umich.edu/~urel/admissions/legal/expert/index.html (last modified Feb. 4, 2002) [hereinafter Compelling Need].

76. *See* BOWEN & BOK, *supra* note 8. The data in the study come from a huge database called College and Beyond (C&B), built by the Andrew Mellon Foundation between 1994 and 1997. *Id.* at xxvii-xxx. The C&B database contains records of 80,000 undergraduate students who matriculated at twenty-eight selective colleges and universities in 1951, 1976 and 1989. *Id.* at xxvii-xxviii. The institutions include liberal arts colleges as well as research universities. *Id.* at xxviii-xxix (listing the twenty-eight schools). Eight were among the top twenty most selective schools in the nation, as measured by average SAT scores; another thirteen were among the fifty-three next most selective schools; and the remaining seven were among the 241 next most selective schools. *Id.* at xxix. Although the twenty-eight schools are not representative of American higher education, they are representative of the roughly 300 most selective schools in the country. *Id.* For purposes of studying affirmative action, this is a highly relevant sample given the fact that racial preferences "are most pronounced at the most selective colleges." Kane, *supra* note 13, at 436-38 (showing through empirical analysis that race plays little or no role in admissions decisions at the vast majority of undergraduate institutions). The C&B database follows the students at these institutions before, during, and after they attend college, yielding a rich array of data and sufficiently large sample sizes to permit reliable comparisons among various groupings of students and institutions. *See* BOWEN & BOK, *supra* note 8, at xxix-xxx. Although the study does not examine minority students other than blacks, the data come from years (1951, 1976 and 1989) in which blacks were the primary beneficiaries of affirmative action.

77. For critical reviews, see Stephan Thernstrom & Abigail Thernstrom, *Reflections on* The Shape of the River, 46 UCLA L. REV. 1583 (1999); Clifford Adelman, *The Rest of the River*, U. BUS., Jan.-Feb. 1999, at 42; and THREE VIEWS OF THE RIVER (Center for Equal Opportunity ed., 1998), *at* http://www.ceousa.org/html/bok.html (Nov. 1998) (reviews by Linda Chavez, Dave O'Neill and Roger Clegg). For more favorable reviews, see Ronald Dworkin, *Affirming Affirmative Action*, N.Y. REV. BOOKS, Oct. 22, 1998, at 91; Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697 (1999). A nicely balanced critique is offered by Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874 (1999).

Yet even if the concept of race as a tipping factor is more rhetoric than reality, that realization provides no basis for suspecting that racial preferences significantly hinder white applicants' chances of success, as the racial quota in *Bakke* purportedly did. The latter concern is, as it was in *Bakke*, a direct consequence of the causation fallacy. Justice Powell's distinction between racial quotas and the plus-factor approach has always aroused suspicion,[78] and there is little reason to be invested in it once the causation fallacy is unraveled. As I explain below, the asymmetry that characterizes the effect of racial quotas in *Bakke* also characterizes the effect of affirmative action policies in general. Affirmative action, while significantly benefiting minority applicants, does not significantly burden white applicants.

A. *The Admissions Advantage for Minority Applicants*

The most common approach to quantifying the degree of preference afforded by affirmative action is to compare average test scores of white and minority applicants.[79] Bowen and Bok's study shows that although the black-white gap in SAT scores has narrowed considerably over the past three decades, especially at selective institutions,[80] it remains quite large. At the five institutions for which Bowen and Bok had the most detailed admissions data,[81] the average SAT score for 1989 black matriculants was 1157, while the average for white ma-

78. Justice Powell might be said to have invited the suspicion by writing, somewhat evasively, that his plus-factor approach

> is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, *although not necessarily according them the same weight*. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

Bakke, 438 U.S. at 317 (opinion of Powell, J.) (emphasis added). The first to doubt Justice Powell's approach was not a judicial or political conservative; it was Justice Brennan. In *Bakke*, he wrote:

> There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.

Id. at 378 (Brennan, J., concurring in the judgment in part and dissenting in part).

79. For well-known examples of this approach, see *Bakke*, 438 U.S. at 277 n.7 (opinion of Powell, J.); RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 449-68 (1994); and STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 397-409 (1997).

80. *See* BOWEN & BOK, *supra* note 8, at 20-22, 30-31 & figs.2.6, 2.7.

81. The five institutions include three private universities and two co-ed liberal arts colleges, "roughly representative" of the larger universe of twenty-eight selective four-year colleges and universities they examined in their study. *Id.* at 17 n.4. Bowen and Bok did not identify these schools because of promises of confidentiality. *See id.*

triculants was 1331[82] — a difference of 174 points, or more than one standard deviation. This gap provides some evidence of the effect of racial preferences.

Importantly, however, racial preferences explain only *some* of the gap. Although it is tempting to conclude that affirmative action is responsible for the entire test score gap, that conclusion would be a mistake. In addition to racial preferences, the gap in average SAT scores of black versus white matriculants directly reflects the gap in average SAT scores of black versus white *applicants*.[83] Compared to whites who apply to selective institutions, blacks are underrepresented at higher SAT levels and overrepresented at lower SAT levels relative to their proportion in the applicant pool.[84] This means that even if selective institutions admitted students solely on the basis of SAT score with no racial preferences (e.g., by admitting applicants in rank order until all the seats are filled, or by setting a minimum SAT threshold above which all applicants are admitted), relatively more black admittees would be found at lower SAT levels, while relatively more white admittees would be found at higher SAT levels. The resulting black-white gap would simply mirror, in slightly attenuated form, the gap in average SAT scores between black and white applicants.[85] As Bowen and Bok correctly observe, "[t]he only way to create a class in which black and white students had the same average SAT score would be to discriminate *against* black candidates."[86] In short, although racial gaps in test scores suggest that affirmative action is probably at work, they do not conclusively or validly indicate the magnitude of the effect.

The gap in average SAT scores between black and white applicants suggests that under a race-neutral selection process, black applicants would be less likely on average than white applicants to gain admission to selective institutions. In fact, the opposite is true: At the five institutions where Bowen and Bok examined the racial gap in SAT scores, approximately 25% of white applicants gained admission for the fall of 1989, compared to 42% of black applicants.[87] With the test score gap as a backdrop, this difference in admission rates begins to

82. *Id.* at 29; *see also* HERRNSTEIN & MURRAY, *supra* note 79, at 452 (showing similar black-white gaps in SAT scores at twenty-three selective institutions). At four of the five institutions Bowen and Bok studied, they found that the average gap in SAT scores between black and white matriculants narrowed by sixty-eight points between 1976 and 1989. *See* BOWEN & BOK, *supra* note 8, at 30. Given this trend, it is possible that the gap has narrowed further between 1989 and 2000.

83. *See* Kane, *supra* note 13, at 433-35.

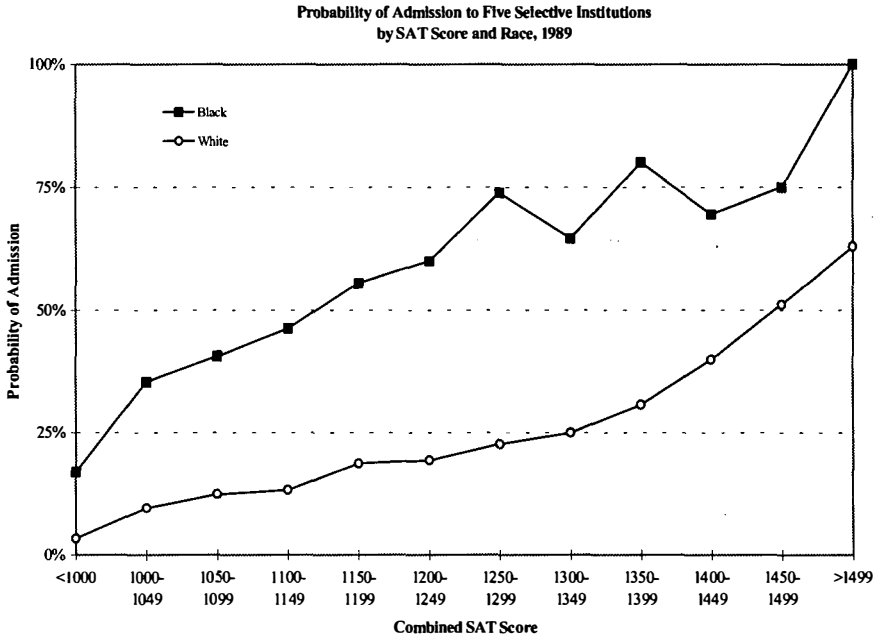
84. *See* BOWEN & BOK, *supra* note 8, at 20 fig.2.2.

85. A similar gap would remain if selective institutions based admissions solely on class rank as determined by high school grade point averages. *See* Kane, *supra* note 13, at 435.

86. BOWEN & BOK, *supra* note 8, at 16.

87. *Id.* at 26. Bowen and Bok clarify that "[w]hen we speak of 'applicants' we really mean 'applications.' " *Id.* at 18 n.5. Some applicants applied to more than one school in the

provide a measure of the impact of racial preferences. Yet a difference between a 25% and a 42% likelihood of admission, though significant, is not so large that it obviously demonstrates the use of race as more than a tipping factor. Viewed one way, the data show that black applicants were 68% more likely than white applicants to be admitted. Viewed another way, the data show that a substantial majority of both white and black applicants did not receive offers of admission, and that black applicants were only 23% less likely than white applicants to be rejected.



As Bowen and Bok point out, however, comparing average rates of admission for blacks and whites provides "an inaccurate picture of the role played by race in the admissions process."[88] A different picture emerges when admission rates are disaggregated by SAT inter-

C&B database; thus, the true number of applicants is less than the number of applications. *Id.* For present purposes, this distinction is immaterial as long as it is clear that the basic unit of analysis is the selection decision (admission or rejection) reached for each discrete application.

88. *Id.* at 26.

val:[89] The figure above shows that while the likelihood of admission generally increased with SAT score for both black and white applicants,[90] blacks were admitted at a higher rate than whites at every SAT interval.

A closer look at this gap in admission rates yields three observations. First, the gap narrows as SAT scores become lower. At the two most selective institutions within Bowen and Bok's sample, the admission rates for blacks and whites with SAT scores below 1100 "were essentially the same (and in some cases actually slightly higher for the low-scoring white applicants, a group that included some recruited athletes)."[91] These data suggest that racial preferences have little or no effect at the low end of an institution's SAT distribution. Intuitively, this makes sense: Selective institutions admit few applicants at the low end of SAT scores, regardless of whether they are black or white.

Second, the gap also narrows as SAT scores become higher. This gap-narrowing is primarily attributable to the sharp increase in the rate of white admissions toward the high end of SAT scores. For white applicants, the likelihood of admission rose from 30% at the 1350-1399 SAT interval to 63% at SAT scores of 1500 or above, whereas admission rates for black applicants remained virtually the same (roughly 70% to 75%) at the higher end of SAT scores.[92] Racial preferences appear to have some effect on admission rates at the high end of SAT scores, but the size of the effect is not overwhelming. This also makes sense: Selective institutions admit high proportions of applicants with high SAT scores, regardless of whether they are black or white.

Third, the black-white gaps in admission rates are greatest in the middle to upper-middle range of SAT scores, and the magnitude of the gaps is striking. At the 1200-1249 SAT interval, 60% of blacks were admitted, compared to 19% of whites. At the 1250-1299 interval, 74% of blacks were admitted, compared to 23% of whites. And at the 1350-1399 interval, 80% of blacks were admitted, compared to 31% of

89. *See id.* at 27 fig.2.5. The precise values of the probabilities graphed in the figure appear in *infra*, Appendix, Table A, lines 6 and 8.

90. The curve for black applicants becomes choppy at the higher end of SAT scores due to the very small number of black applicants at these high SAT intervals. The underlying data for the graph show that only 5% of black applicants had SAT scores in the 1300-1349 interval, 3.1% scored 1350-1399, 1.3% scored 1400-1449, 0.5% (a total of twelve black applicants) scored 1450-1499, and 0.1% (a total of two black applicants) scored over 1500. *See infra* Appendix, Table A, lines 1 and 2. With larger samples, the figure likely approximates an ellipse rotated at a slight angle.

91. BOWEN & BOK, *supra* note 8, at 43.

92. *Infra* Appendix, Table A, lines 6 and 8. Again, the admission rates for black applicants is choppy at the high end of SAT scores because of small numbers. The spike at the right end of the curve reflects the fact that nine out of twelve black applicants scoring 1450-1499 on the SAT were admitted, while two out of two black applicants scoring 1500 or higher were admitted. *Infra* Appendix, Table A, lines 2 and 7.

whites.[93] Within this range of SAT scores, black applicants were up to three times more likely than whites to be admitted, even as white applicants were up to three times more likely than blacks to be rejected. These data suggest that racial preferences in selective admissions have their greatest impact on applicants in the middle to upper-middle range of SAT scores (1100 to 1399). Most applicants to selective schools — 50% of blacks and 70% of whites — fall within this range.[94] Thus, affirmative action gives minority applicants a substantial advantage in the range of SAT scores where the broad majority of white applicants compete.

Differences in admission rates by SAT interval might overstate the effect of racial preferences were it true that the differences reflect not only the role of affirmative action, but also the influence of other selection criteria against which black applicants are more favorably situated than white applicants with similar SAT scores. In other words, controlling for additional factors might narrow the gap. There is reason to believe, however, that additional controls would not narrow the gap by much and that Bowen and Bok's data on admission rates do yield valid inferences about the effect of racial preferences.

First, it is well-established that SAT scores tend to overpredict the undergraduate academic performance of black students relative to white students. Consistent with other research,[95] Bowen and Bok found that within their sample of twenty-eight selective institutions, the average class rank (based on four-year cumulative grade point averages) of black matriculants in 1989 was significantly lower than the average rank of white matriculants *within every SAT interval*. Whereas whites with SAT scores at or above 1300 ranked on average in the 60th percentile of their class, blacks with similar SAT scores ranked on average in the 36th percentile. At lower SAT intervals, the size of this gap remained between 22 and 25 percentile points.[96] Although part of this gap is likely attributable to black versus white students' experiences in college,[97] at least some part is attributable to differences in

93. *Infra* Appendix, Table A, lines 6 and 8.

94. *Infra* Appendix, Table A, lines 1 and 3.

95. *See* LEONARD RAMIST ET AL., STUDENT GROUP DIFFERENCES IN PREDICTING COLLEGE GRADES: SEX, LANGUAGE, AND ETHNIC GROUPS, College Board Report no. 93-1 (1994) (summarizing research); *see also* PATRICIA GÁNDARA, PRIMING THE PUMP: STRATEGIES FOR INCREASING THE ACHIEVEMENT OF UNDERREPRESENTED MINORITY UNDERGRADUATES 43-44 (1999) (citing research confirming "the overprediction problem") (available at <http://www.collegeboard.org>) (last visited Feb. 11, 2002); L. SCOTT MILLER, AN AMERICAN IMPERATIVE: ACCELERATING MINORITY EDUCATIONAL ADVANCEMENT (1995) (same); Vars & Bowen, *supra* note 75, at 465-73.

96. BOWEN & BOK, *supra* note 8, at 75 fig.3.10. Even more striking is the finding that black students with SAT scores at or above 1300 ranked on average 4 percentile points *lower* than white students with SAT scores of less than 1000. *Id.*

97. *See id.* at 77 (finding that even after controlling for high school grades and socioeconomic status, a gap of 15 to 21 percentile points persists across all C&B schools); *id.* at 81-86

academic preparation not captured by SAT scores.[98] Black applicants, the research shows, are somewhat less academically well-prepared than white applicants with the same SAT scores.[99]

Second, black and white applicants with similar SAT scores might not be similarly situated with respect to nonacademic admissions criteria. It is possible, for example, that proportionally more blacks than whites within a given SAT interval come from economically disadvantaged backgrounds.[100] If an institution sought to achieve socioeconomic diversity as one of its admissions goals, then this might explain part of the gap in admission rates between black and white applicants.

(discussing influences in the college environment that may affect academic outcomes for black students); Vars & Bowen, *supra* note 75, at 473 (stating that substantial variance in the black-white GPA gap from campus to campus suggests that college experiences play a role in determining academic outcomes). For research suggesting that vulnerability to stereotypes may harm the college academic performance of black students, see Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra* note 13, at 401-27.

98. Bowen and Bok found that controlling for black-white differences in high school grades and socioeconomic status, in addition to SAT scores, gender, school selectivity, field of study, and athlete status, closed the black-white gap in average class rank among students in their entire sample of twenty-eight institutions by roughly 14 percentile points. BOWEN & BOK, *supra* note 8, at 77. A more modest effect was observed in a study of 1989 matriculants at eleven institutions within Bowen and Bok's sample; that study showed that controls for socioeconomic status, including parental occupation and education, narrowed the black-white college performance gap by roughly 10%. Vars & Bowen, *supra* note 75, at 471. At one institution able to provide very detailed admissions data, more sophisticated controls integrating several predictors of academic performance, including SAT and achievement test scores, high school grades in core subjects, advanced placement data, and secondary school quality, narrowed the gap by about 15%. *See id.* at 472.

99. Bowen and Bok suggest that the educational background of whites and blacks differ in an array of unmeasurable and, in some cases, intangible resources, including "educational aspirations," "the number of books at home," "opportunities to travel," "the nature of the conversation around the dinner table," " 'at-home' education . . . in some instances because of the presence of a 'stay-at-home Mom,' who has deliberately sacrificed family income," and "less pressure to take jobs during the school year" — factors not captured by black-white differences in socioeconomic status based on conventional measures, but likely correlated with black-white differences in wealth. *Id.* at 80-81; *see also* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 55-81 (1999) (describing the intangible educational resources that wealth (i.e., ownership of assets) provides, and arguing that black-white gaps in wealth, not income, largely explain black-white gaps in educational attainment). *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

Importantly, however, black-white differences in academic preparation do not mean that affirmative action sets minority students up for failure. Bowen and Bok's research provides strong evidence that minority students who attend highly selective schools do not fare worse and in fact fare better in terms of graduation rates, advanced degrees, earnings, and satisfaction with college than minority students with similar SAT scores who attend less selective schools. *See* BOWEN & BOK, *supra* note 8, at 59-68, 114-15, 142-44, 198-201.

100. *Cf.* Kane, *supra* note 13, at 449 (among 1992 high school graduates with combined reading and math scores in the top tenth of the class, only 6.1% of whites but 17.2% of blacks and Hispanics had income below $20,000).

The same might be said about preferences for athletes.[101] Yet it is doubtful that controlling for the full range of nonacademic factors would significantly narrow the wide gap in admission rates at the middle to upper-middle range of SAT scores. It seems reasonable to believe that special talents, personal accomplishments, leadership abilities, participation in extracurricular activities or community service, and other nonacademic qualities valued by admissions officers are evenly distributed across racial lines, or at least not significantly less concentrated among white applicants than among blacks.[102] Indeed, within a given SAT interval, there is reason to suspect these qualities might be more concentrated within the 20% to 25% of white applicants who gain admission than within the 60% to 75% of black applicants who gain admission.[103]

Third, even if socioeconomic status accounts for part of the high admission rates for blacks as compared to whites, this effect is offset by the substantial preference given to applicants who are children of alumni, a preference that works largely to the benefit of whites. In Bowen and Bok's study, legacy preferences had a sizable effect on admission rates within the SAT intervals where black-white gaps in admission rates were largest.[104] There is also evidence that geographic

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101. The evidence suggesting that athletic preferences increase racial diversity is not overwhelming. Subsequent to Bowen and Bok's research, the Mellon Foundation sponsored a large-scale study of intercollegiate athletics. *See* JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001). Examining data from thirty institutions varying in size and academic selectivity, that study concluded that "although athletics helps promote racial diversity, the impact is modest." *Id.* at 55. Although the recruitment of male athletes for high-profile sports (basketball, football, and hockey) has "clearly helped to diversify campuses," *id.* at 54, "[t]he same statement cannot be made . . . for [l]ower [p]rofile sports . . . in which the percentage of male athletes who were black was generally in the 3 to 4 percent range," *id.* at 54-55 & fig.2.8 (presenting 1989 data). Moreover, "[o]nly in the Division IA private universities has the presence of women athletes increased the relative number of African American women." *Id.* at 136 & fig.6.6 (reporting 1989 data). Overall, "the pressure to increase athletic opportunities for women, driven in large part by Title IX, cannot be said to have encouraged a greater degree of racial diversity." *Id.* at 137.

102. *Cf.* BOWEN & BOK, *supra* note 8, at 31 ("[O]ne commonsense way of representing (retrospectively) a process in which the race of the applicant was truly unknown to admissions officers is by assuming that black applicants, grouped by SAT ranges, would have the same probability of being admitted as white applicants in those same ranges.").

103. The intuition here is that within any group of applicants with similar SAT scores (say 1250-1299), there is a distribution ranging from those applicants who are exceedingly accomplished or desirably well-rounded to those who are overly narrow, bookish, or otherwise lackluster. Assuming that the shape of this distribution is similar for blacks and whites scoring 1250-1299, the relatively small fraction of white applicants offered admission (23%) is likely to include proportionally more candidates from the favorable end of the distribution than the relatively large fraction of black applicants offered admission (74%).

104. *See* BOWEN & BOK, *supra* note 8, at 29. At the 1200-1299 SAT interval, 35% of legacy applicants were admitted, compared to 22% of non-legacy applicants and roughly 60% of black applicants. *Id.* At SAT scores at or above 1300, 60% of legacies were admitted, compared to 24% of non-legacies and 70% of black applicants. *Id.* Although Bowen and Bok do not tell us how many applicants had legacy status, other data suggest that the num-

preferences disproportionately favor white applicants.[105] Thus, controlling for alumni and geographic preferences would widen black-white gaps in admission rates.

In sum, differences in admission rates based on SAT scores provide a reasonably valid measure of the admissions advantage black applicants receive through affirmative action. As suggested by the Harvard College admissions policy featured in *Bakke*, racial preferences operate not at the top or bottom of the applicant pool, but in "the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses."[106] Contrary to what *Bakke* suggests, however, the race of a minority applicant in this middle group does not merely "tip the balance in his favor."[107] It confers a considerable advantage that is much more substantial than proponents of affirmative action typically acknowledge.

Interestingly, Justice Powell's effort to downplay the role of race in admissions finds a parallel twenty years later in Bowen and Bok's work. Bowen and Bok, former university presidents who are long-time supporters of affirmative action and whose institutions (Princeton and Harvard, respectively) are featured in *Bakke*,[108] decline to draw any inference about the effect of racial preferences from the substantial black-white gap in admission rates. Instead, they argue that:

> [t]he best way to measure the degree of preference given is by comparing the credentials of those black students who presumably would not have been enrolled under a race-neutral standard . . . with the credentials of an equivalent number of rejected applicants (mostly white) who would have been admitted under a race-blind procedure.[109]

The first group, termed "retrospectively rejected" blacks,[110] consists of black matriculants who would have been rejected if "black applicants,

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bers are not insignificant. *See, e.g.*, JEAN H. FETTER, QUESTIONS AND ADMISSIONS: REFLECTIONS ON 100,000 ADMISSIONS DECISIONS AT STANFORD 75-76 (1995) ("[I]n a typical year, about 5 percent of the applicants [to Stanford], and about 10-12 percent of the enrolling freshman class, would be legacies."); *id.* at 76 (quoting an investigative finding by the Office for Civil Rights at Harvard that "[i]n 1988 . . . 280 of 1,602 Harvard freshmen, more than one in six, had fathers who had attended Harvard").

105. *See* RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 166, 235 n.75, 300 n.70 (1996). Recall that Justice Powell's paradigmatic example of a geographic preference favors applicants from largely white rural areas over applicants from more racially diverse urban areas: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (opinion of Powell, J.) (quoting Harvard College admissions policy).

106. *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.).

107. *Id.*

108. *Id.* at 316-17 (opinion of Powell, J.) (quoting Harvard's admissions policy); *id.* at 317 n.51 (quoting William Bowen's description of Princeton's admissions policy).

109. BOWEN & BOK, *supra* note 8, at 18.

110. *Id.* at 37.

grouped by SAT ranges, [had] the same probability of being admitted as white applicants in those same ranges."[111] Against their qualifications, Bowen and Bok would compare "the test scores and grades of the bottom decile of the white students who were admitted," a group they take to be a fair approximation of "the other students, presumably mostly white and Asian Americans, who would have taken [the] places" of retrospectively rejected blacks.[112]

Curiously, Bowen and Bok do not provide results of their proposed comparison for the five institutions where they had the most detailed admissions data. Instead, they discuss a recent study of thirty selective law schools showing that while "the average LSAT score of all white students was 24 percent higher than the average LSAT score of all black students[,] this difference shrinks to 10 percent when . . . the LSAT scores of the retrospectively rejected black students [are compared] with the scores of the lower-ranked white students."[113] Presumably, performing the same comparison using Bowen and Bok's sample would produce a similar result.[114]

But the comparative method Bowen and Bok propose is flawed. Given the nuance with which they describe the admissions process in other parts of their book,[115] it is surprising that, in characterizing the magnitude of racial preferences, they assume that the applicants who would replace retrospectively rejected blacks in a race-neutral admission process are those with the academic qualifications of the bottom decile of admitted white students. This assumption seems to imply that selective institutions admit applicants in rank order based on test scores and grades, such that opening up X number of seats through a race-neutral process would enable an institution to admit the next X applicants on the list. But selective admissions processes do not work that way. Just as Bowen and Bok's retrospectively rejected blacks consist of black applicants up and down the SAT distribution, it is surely more reasonable to believe that the "retrospectively admitted" whites likewise would consist of applicants up and down the SAT distribu-

111. *Id.* at 31.

112. *Id.* at 37.

113. *Id.* at 37-38 (citing data supplied in Personal Correspondence from Linda Wightman, former Vice President for Testing, Operations, and Research, Law School Admissions Council).

114. At Bowen and Bok's sample of five selective institutions, the average SAT score of black applicants who would have been rejected under their race-neutral model was 1145. *Id.* at 42. Within the entire sample of C&B institutions, 12% of white admittees had SAT scores lower than 1200, and nearly half of this group had scores in the 1150-1199 interval. *See infra* Appendix, Table A, line 9. Assuming Bowen and Bok are correct that their sample of five institutions is "roughly representative" of the C&B pool, BOWEN & BOK, *supra* note 8, at 17 n.4, this rough comparison suggests that the test score gap between retrospectively rejected black applicants and the bottom decile of white admittees is indeed small.

115. *See, e.g.*, BOWEN & BOK at 23-29.

tion, not simply those in the bottom decile. In other words, if a race-neutral admissions policy made available X seats for an institution to fill, why would it fill those seats with applicants whose qualifications mirrored those of the bottom of the class? The more likely scenario is that the institution, following its usual selection process, would increase white admission rates proportionally at *every* SAT interval. The average SAT score of the resulting pool of retrospectively admitted white students would be roughly the same as the average for all admitted whites, and the difference between this number and the average SAT score of retrospectively rejected blacks would be quite large.[116]

Moreover, Bowen and Bok's approach to measuring the effect of racial preferences, even when properly executed, is unilluminating for the same reason they themselves criticize black-white comparisons of average SAT scores.[117] Such comparisons fail to distinguish between the true effect of racial preferences and the large preexisting gap between the SAT distributions of white and black applicants. The underrepresentation of black applicants relative to whites at the high end of SAT scores, along with the overrepresentation of blacks relative to whites at the low end, means that differences in average SAT scores of black and white admittees cannot be reliably attributed to the impact of affirmative action. Examining admission rates for black and white applicants with similar SAT scores avoids the problem of the preexisting test score gap and thus provides a more sensible approach to characterizing the effect of racial preferences.

B. *The Admissions Disadvantage for White Applicants*

Whether intended or not, Bowen and Bok's effort to minimize the admissions advantage enjoyed by minority applicants appears to reflect a felt need to harmonize the actual practice of affirmative action with the policy design that Justice Powell thought constitutionally permissible. With Princeton and Harvard as his models, Justice Powell elaborated the plus-factor approach as an alternative to racial quotas. For Justice Powell, the difference in design was critical. Unlike Bakke, who successfully argued that the medical school's quota cost him a letter of admission, a white applicant who loses a seat to a minority applicant when race is used as a tipping factor may infer "only that his combined qualifications, which may have included similar nonobjec-

116. Bowen and Bok do not provide the average SAT scores of white and black applicants admitted to their sample of five selective institutions. But using the average SAT score of white applicants (1284) as the lowest possible approximation of the average SAT score of white admittees, *see id.* at 29, we find that the average test score gap between white admittees and retrospectively rejected blacks (1145) is at least 139 points (1284 – 1145). The actual gap is likely closer to 186 points, which is the difference between the average score of white matriculants (1331) and the average score of retrospectively rejected blacks (1145).

117. *See id.* at 16-17.

tive factors, did not outweigh those of the other applicant."[118] That inference is certainly correct. But the validity of the inference, while giving the plus-factor approach a greater appearance of fairness than racial quotas,[119] ultimately has nothing to do with using race as a mere plus factor. It is instead dictated by the same statistical realities that compel the inference that Bakke's rejection was most likely attributable to his combined qualifications and not the racial quota. In other words, what matters in determining the most reasonable causal inference is not the format of affirmative action that an institution chooses, but rather the basic arithmetic of selective admissions.

Consider, for example, the basic outline of Jennifer Gratz's lawsuit against the University of Michigan, a leading test case likely to end up at the Supreme Court this year. Gratz, who applied in 1994 for admission as an undergraduate, claims that the university discriminated against her not by using a racial quota, but by admitting minority students at much higher rates than it admitted white students with similar high school grades and SAT scores. Among applicants with grades and scores comparable to hers, all forty-six minorities (100%) — but only 121 out of 378 whites (32%) — gained admission.[120] Relying on this disparity in admission rates, Gratz contends that she would have been admitted were it not for racial preferences.[121]

Whereas Bakke's case was built on racial differences in average grades and test scores, Gratz's case is built on racial differences in admission rates. But Gratz, like Bakke, is seeking to advance the causation fallacy in defiance of basic arithmetic. In the year Gratz applied, a total of 424 applicants (378 whites plus forty-six minorities) had grades and test scores comparable to hers; a total of 167 were admitted (121 whites plus forty-six minorities). Under the university's race-conscious admissions policy, white applicants had a 32% chance of admission (121 divided by 378). Had the university admitted applicants at the same overall rate regardless of race, the average likelihood of admission for white and minority applicants would be 39% (167 divided by

118. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

119. *See id.* at 319 n.53 (opinion of Powell, J.) (favoring the plus-factor approach over racial quotas on the ground that " '[j]ustice must satisfy the appearance of justice' " (quoting Offutt v. United States, 348 U.S. 11, 14 (1954) (Frankfurter, J.)) (alteration in original)).

120. Brief for Jennifer Gratz et al. at 17-18, Gratz v. Bollinger (6th Cir. May 7, 2001) (Nos. 01-1333, 01-1416, 01-1418), *available at* www.umich.edu/~urel/admissions/legal/ (last visited April 16, 2002).

121. Although Gratz, having enrolled and graduated from another college, does not seek an order of admission to the University of Michigan, she does seek damages resulting from her denial of admission. *See* Gratz v. Bollinger, 122 F. Supp. 2d 811, 815, 816 (E.D. Mich. 2000) (observing that Gratz filed, among other things, a § 1983 action for monetary relief); *see also* Complaint ¶ 25, Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (No. 97-75231), *available at* http://www.umich.edu/~urel/admissions/legal/gratz/gratzham.html (last modified Feb. 4, 2002) ("As a result of defendants' racially discriminatory procedures and practices, plaintiffs' applications were rejected.").

424). In other words, affirmative action increased the average likelihood of rejection for white applicants from 61% to 68%. Affirmative action, to be sure, had some effect. But the key point is that admissions decisions concerning white applicants remain, on average, far better explained by an applicant's combined qualifications than by the effect of affirmative action.

In *Gratz*, as in *Bakke*, the smallness of the pool of minority applicants and the relevance of nonobjective criteria in selecting among large numbers of white applicants conspire to limit the effect on white applicants of substantial preferences for minority applicants. Using data from Bowen and Bok's study, it is possible to generalize the statistical result observed in *Gratz*. Their data permit a rough comparison between the actual likelihood of admission for white applicants within a certain SAT interval and the hypothetical likelihood of admission for those white applicants under a race-neutral selection process.

As in Gratz's case, the hypothetical race-neutral likelihood of admission for all applicants within a given SAT interval may be estimated by dividing the total number of applicants actually admitted by the total number of applicants. This assumes that admissions officers would admit applicants with similar SAT scores (black or white) at the same rate, and that the number of applicants actually admitted within a given SAT interval equals the number that would have been admitted under a race-neutral process. Within the 1200-1249 SAT interval, for example, Bowen and Bok's five selective institutions admitted 543 out of 2816 white applicants and 147 out of 245 black applicants in 1989 — a total of 690 out of 3061 applicants.[122] Thus, the hypothetical likelihood of admission for an average applicant (white or black) scoring 1200-1249 on the SAT would have been 22.5% (690 divided by 3,061) — only slightly higher than the actual 19.3% rate of admission for whites in this SAT interval.[123] The fact that the actual rate of admission for black applicants within this SAT interval was 60% (indeed, considerably higher than the actual rate for whites) is relevant to understanding the benefit of being black, but irrelevant to understanding the burden that racial preferences imposed on white applicants.

122. *Infra* Appendix, Table A, lines 2, 4, 5, 7, 9 and 10.

123. *See infra* Appendix, Table A, lines 8 and 11.

TABLE 1
ACTUAL RATES VERSUS RACE-NEUTRAL RATE
OF ADMISSION FOR BLACK AND WHITE APPLICANTS[124]

SAT interval	Actual rate of admission for black applicants	Actual rate of admission for white applicants	Race-neutral rate of admission for all applicants
1500+	100.0%	63.0%	63.2%
1450-1499	75.0%	51.1%	51.1%
1400-1449	69.6%	39.9%	40.3%
1350-1399	80.0%	30.7%	31.7%
1300-1349	64.6%	25.0%	26.2%
1250-1299	73.9%	22.6%	25.7%
1200-1249	60.0%	19.3%	22.5%
1150-1199	55.5%	18.7%	22.9%
1100-1149	46.2%	13.3%	18.2%
1050-1099	40.6%	12.4%	18.6%
1000-1049	35.4%	9.6%	16.8%
<1000	17.0%	3.3%	8.6%

As Table 1 shows, eliminating racial preferences leaves the rate of admission for white applicants virtually unchanged at the high end of SAT scores (1300 and above), where the number of black applicants is especially small. Although the difference between the actual and hypothetical race-neutral admission rates for white applicants increases from roughly 3 to 5 percentage points as SAT scores decrease from 1300 to 1100, the advantage of race neutrality for white applicants remains small at precisely the SAT intervals where the advantage of race consciousness for black applicants is largest. The advantage of race neutrality appears to accrue primarily to white applicants at the low end of the SAT range (below 1100). There the difference between actual and hypothetical admission rates for whites approaches 7 percentage points, largely because the number of black applicants who would be denied admission under a race-neutral process is substantial relative to the total number of white applicants. However, since selective institutions admit so few applicants (black or white) in this low range, the advantage of race neutrality is more illusory than real. At SAT scores below 1000, for example, a white applicant who faced a 96.7%

124. For methodology and calculations, see *infra* Appendix, Table A.

likelihood of rejection can hardly argue that race-consciousness cost her a letter of admission when she would have faced a 91.4% likelihood of rejection under a race-neutral process. For applicants facing such long odds, the marginal effect of affirmative action is just that — marginal.

Moreover, there is reason to believe that the effect of affirmative action is even more marginal than the hypothetical race-neutral admission rates in Table 1 suggest. Those rates were calculated on the assumption that the total number of applicants actually admitted within a given SAT interval fairly approximates the total number that would have been admitted under a race-neutral process. But that assumption almost certainly overestimates the number of admittees in the absence of racial preferences. The reason has to do with black-white differences in "yield," the rate at which applicants offered admission actually accept the offer. As Bowen and Bok explain, when admissions processes use racial preferences, the yield "tends to be lower for highly qualified black candidates than for comparable white candidates because the black candidates are likely to be admitted by more schools."[125] At the five institutions for which Bowen and Bok had the most detailed data, the average black-white difference in yield was 14 percentage points in 1989.[126] White applicants scoring 1100 to 1349 on the SAT accepted offers of admission more than 50% of the time, whereas comparable black applicants accepted offers only 30% to 40% of the time.[127]

In the absence of racial preferences, however, the rate at which black applicants accept offers of admission "would almost surely rise" and "would move up toward the white yield."[128] In other words, "[i]f all institutions of higher education were required to adopt race-neutral admissions policies . . . the typical black candidate who was still accepted by any given school would presumably have fewer options."[129] One would expect to see black applicants accept offers at the same rate as white applicants if both are admitted at the same rate and face the same array of options. The elimination of affirmative action thus means that selective institutions would not need to make as many offers of admission as they otherwise would in order to fill the same number of seats. By decreasing the total number of offers required to produce the same number of matriculants, the projected increase in

125. BOWEN & BOK, *supra* note 8, at 33-34. For the same reason, the yield for black or white applicants tends to decrease as SAT scores increase, indicating that applicants with higher SAT scores are likely to have more choices than applicants with lower SAT scores. *See id.* at 34 & fig.2.9.

126. *See id.* at 34 n.18.

127. *Id.* at 34 fig.2.9.

128. *Id.* at 35.

129. *Id.*

black yield tends to lower the hypothetical race-neutral rate of admission.[130]

Using Bowen and Bok's data on yield, it is possible to adjust the hypothetical race-neutral admission rates in Table 1 to account for this additional factor. As we observed earlier, for example, in 1989 the five schools in Bowen and Bok's sample admitted 543 out of 2816 white applicants and 147 out of 245 black applicants scoring 1200 to 1249 on the SAT, a total of 690 out of 3061 applicants.[131] Within that SAT interval, 53.4% of whites and 31.9% of blacks accepted offers of admission,[132] which means that roughly 290 whites and forty-seven blacks, or a total of 337 students, accepted offers.[133] In the absence of racial preferences, how many applicants would the five schools need to admit in order to gain 337 acceptances? If the yield for white applicants, 53.4%, provides a good estimate of the yield for all applicants (black or white) under a race-neutral process, then a total of 631 applicants would need to be admitted,[134] slightly less than the 690 applicants actually admitted under race-conscious policies. The resulting race-neutral admission rate, now adjusted for yield, is 20.6%,[135] even lower than the unadjusted race-neutral rate of 22.5% and only marginally higher than the 19.3% admission rate that white applicants actually faced. As Table 2 shows, adjusting for yield produces similar results within every SAT interval, confirming that the impact of racial preferences on the odds of admission facing white applicants is remarkably slight.

130. Of course, this observation assumes that the elimination of affirmative action would not cause selective institutions to expand the number of seats in their entering classes. I see no reason why such expansion would occur.

131. *Infra* Appendix, Table A, lines 2, 4, 5, 7, 9, and 10.

132. *Infra* Appendix, Table B, lines 1 and 4.

133. 53.4% x 543 whites = 290 whites. 31.9% x 147 blacks = 47 blacks. 290 whites + 47 blacks = 337 students total. *See infra* Appendix, Table B, lines 3, 6, and 7.

134. 631 x 53.4% = 337. *See infra* Appendix, Table B, line 8.

135. 631 ÷ 3061 = .206. *See infra* Appendix, Table B, line 10.

TABLE 2
ACTUAL RATE VERSUS YIELD-ADJUSTED RACE-NEUTRAL RATE OF ADMISSION FOR WHITE APPLICANTS[136]

SAT interval	Actual rate of admission for white applicants	Yield-adjusted race-neutral admission rate	Unadjusted race-neutral admission rate
1500+	63.0%	62.7%	63.2%
1450-1499	51.1%	50.8%	51.1%
1400-1449	39.9%	39.8%	40.3%
1350-1399	30.7%	30.8%	31.7%
1300-1349	25.0%	25.4%	26.2%
1250-1299	22.6%	23.8%	25.7%
1200-1249	19.3%	20.6%	22.5%
1150-1199	18.7%	20.9%	22.9%
1100-1149	13.3%	16.2%	18.2%
1050-1099	12.4%	15.5%	18.6%
1000-1049	9.6%	11.7%	16.8%
<1000	3.3%	6.7%	8.6%

To summarize, there is no doubt that receiving a rejection letter from a selective institution is a considerable disappointment. But the reflexive tendency to blame affirmative action runs counter to basic reasoning and empirical evidence. In any highly selective competition where white applicants greatly outnumber minority applicants, and where multiple objective and nonobjective criteria are relevant, the average white applicant will not fare significantly worse under a selection process that is race-conscious than under a process that is race-neutral. The articulation of this arithmetic truth provides a necessary antidote to the rhetorical excesses of affirmative action's critics.

III. NOT ALL WHITE APPLICANTS ARE CREATED EQUAL

In addition to loosening the grip that the *Bakke* narrative has had on the affirmative action debate, dispelling the causation fallacy gives rise to a variety of legal implications for white plaintiffs challenging affirmative action. Those implications, the subject of this Part, are not

136. For methodology and calculations, see *infra* Appendix, Table B.

immediately apparent from studying the marginal effect of racial preferences on white admissions probabilities. So far I have focused on admissions probabilities in order to highlight the improbability of the causal inference at the core of the *Bakke* narrative. But admissions probabilities, while useful for describing how affirmative action affects white applicants on average, do not capture the mechanics and impact of affirmative action at the level of individual applicants. The odds facing the hypothetical "average white applicant" present only a composite report of the discrete experiences of many individual applicants. What matters in a lawsuit, of course, is not the treatment of the average white applicant, but rather the treatment of the individual applicant who has chosen to become a plaintiff.[137]

Thus, this Part examines what is happening to individual white applicants in the admissions process underneath the probabilities. The conventional *Bakke* narrative, we have already discovered, does not provide a complete account of how affirmative action affects white applicants. This Part elucidates two additional narratives that are quite different and, as a statistical matter, more significant. These alternatives to the *Bakke* narrative suggest important differences in the way affirmative action impacts white applicants — differences obscured by the causation fallacy yet essential to adjudicating their legal claims.

A. *Two Kinds of Injury*

In exploring the legal implications of the causation fallacy, it is important to clarify at the outset what the illogic of the fallacy does not imply: It does not imply that intentional discrimination poses no actionable problem so long as it inflicts little or no consequential harm. Although the basic arithmetic of selective admissions dictates that the vast majority of white applicants who are rejected under a race-conscious admissions process would likewise be rejected under a race-neutral process, those applicants nevertheless have a legitimate ground for complaint under well-established equal protection norms. As the district court in *Hopwood* observed, "there are two types of injury in a case involving the . . . use of racial preferences":[138] a "tangible type of injury . . . [that] occurs when a plaintiff is actually denied some right or benefit, such as admission to [a] school," and "an intangible injury" that occurs when "the government's discriminatory classification . . . prevents a plaintiff from 'competing on an equal footing' with other applicants."[139] In a series of recent decisions, the Supreme

137. The right to equal opportunity is a "*personal* right." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); *see also id.* ("[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.").

138. Hopwood v. Texas, 999 F. Supp. 872, 883 (W.D. Tex. 1998).

139. *Id.* (citation omitted).

Court has made clear that "the inability to compete on an equal footing" is a sufficient injury for constitutional standing to challenge affirmative action, even without any allegation that the plaintiff "would have obtained the benefit but for the [discriminatory] barrier."[140] Justice Powell made this point in *Bakke* when he noted that "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing."[141] "[A]part from the failure to be admitted," Bakke suffered a cognizable injury from "the University's decision not to permit [him] to compete for all 100 places in the class."[142]

The causation fallacy thus does not speak directly to the unfairness of being denied the opportunity to compete on an equal footing. Indeed, both *Bakke* and Bowen and Bok's study indicate that white applicants, even those who would not have been admitted under a race-neutral process, would have faced substantially better odds of admission had they not been white. This fact is quite instructive, for it suggests an ambiguity in what it means to say that the rejection of a white applicant was "caused" by affirmative action. The causal claim could mean, as it does in the *Bakke* narrative, that the white applicant would have been admitted had the admissions process employed no racial preferences. Alternatively, it could mean, as it does in an equal-footing complaint, that the applicant would have been admitted had he been given the same preference as minority applicants. To consider what would have happened to a white applicant had he been black is not equivalent to considering what would have happened to that applicant had the admissions process been race-neutral.

As I explain below, this distinction turns out to be important for differentiating among white applicants and their legal claims. The two kinds of injury attributable to affirmative action enable us to distinguish three kinds of rejected white applicants: One genuinely fits the *Bakke* narrative but rarely appears in court; one has standing to pursue an equal-footing claim, with some limitations; and one lacks standing to challenge affirmative action altogether.

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140. Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993); *see also* Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam) ("The relevant injury in such cases is 'the inability to compete on an equal footing.' " (quoting *Jacksonville*, 508 U.S. at 666)); *Adarand*, 515 U.S. at 211 ("The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' The aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing.' " (alteration in original) (internal citations omitted)).

141. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978) (opinion of Powell, J.).

142. *Id.* at 281 n.14.

B. *Three Kinds of White Applicants*

The clearest way to develop this typology is to examine the mechanics of the admissions process and the outcomes for individual applicants in specific cases. Three helpful examples happen to occur together in a recent lawsuit brought by a trio of white plaintiffs — Ashley Davis, Craig Green, and Kirby Tracy — challenging the University of Georgia's undergraduate admissions policies.[143] Although the latest version of the university's affirmative action policy was recently struck down by the Eleventh Circuit in a different lawsuit,[144] the case filed by Davis, Green, and Tracy nonetheless provides an opportune window for observing the effects of affirmative action within the large and diverse sea of white applicants.

The university, Georgia's flagship institution, maintains a competitive admissions process in which applicants far exceed the number of available seats.[145] In 1995, when Tracy applied, the university had an official policy of admitting students on the basis of minimum SAT scores, high school grade point averages ("GPAs"), and academic index scores (a weighted composite of SAT scores and GPAs). Black applicants were admitted if they had at least an 800 SAT score, a 2.0 GPA, and a 2.0 academic index; white applicants had to have at least a 980 SAT score, a 2.5 GPA, and a 2.4 academic index.[146] Tracy had a GPA of 3.47 and an SAT score of 830. Because he did not meet the minimum requirements for white applicants, the university rejected his application. It was undisputed that Tracy would have been admitted had he been black.[147] Based on uncontested evidence introduced by the university, however, the district court determined that Tracy still would not have been admitted under a race-neutral process.[148]

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143. The chronology of that litigation is as follows: *Wooden v. Board of Regents of University System of Georgia*, 32 F. Supp. 2d 1370 (S.D. Ga. 1999) (ruling on Kirby Tracy and Ashley Davis); *Tracy v. Board of Regents of University System of Georgia*, 59 F. Supp. 2d 1314 (S.D. Ga. 1999) (ruling on Craig Green); *Tracy v. Board of Regents of University System of Georgia*, 208 F.3d 1313 (11th Cir. 2000) (vacating and remanding to the district court for reconsideration in light of Texas v. Lesage, 528 U.S. 18 (1999)); *Tracy v. Board of Regents of University System of Georgia*, No. CV 497-45, 2000 WL 1123268 (S.D. Ga. June 16, 2000) (reinstating prior opinions); *Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262 (11th Cir. 2001) (dismissing in part, affirming in part, reversing and vacating in part, and remanding to the district court). "Wooden" is the name of one of three additional plaintiffs who argued that Georgia's continued operation of historically black institutions unlawfully discriminates against nonblacks. After the district court dismissed the *Wooden* plaintiffs for lack of standing, the Eleventh Circuit dismissed them for failure to file a timely notice of appeal. *See Wooden*, 247 F.3d at 1264.

144. *See* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001).

145. *See Wooden*, 247 F.3d at 1265.

146. *See Wooden*, 32 F. Supp. 2d at 1374 (describing 1995 standard for "automatic admission").

147. *See id.; Wooden*, 32 F. Supp. 2d at 1374.

148. *Tracy*, 2000 WL 1123268, at *7, *11 (citing the record).

The university revised its admissions policy in 1995 out of concern about the constitutionality of its two-track system. The revised policy, which took effect in 1996, divided the admissions process into three stages. In the first stage, the university selected the majority of its freshman class purely on the basis of objective criteria; applicants with minimum academic index and SAT scores were automatically admitted.[149] In 1996, applicants with an academic index of at least 2.6 were automatically admitted; in 1997, the cut-off was 2.5.[150] Among applicants not automatically admitted, the university then selected a subset for further evaluation. In 1996, applicants with an academic index between 2.3 and 2.6 moved to the second stage of the admissions process; in 1997, applicants with an academic index between 2.25 and 2.5 moved forward.[151] All others were automatically rejected. In the second stage, the university calculated what it called a "total student index" ("TSI") based on a combination of academic and demographic factors, including in-state residence, alumni relationships, and (until last year) race.[152] Applicants above a certain TSI threshold were admitted, while applicants below a certain threshold were rejected. Applicants in the middle went on to a third stage, called the "edge read," in which two readers re-evaluated each applicant on the basis of race-neutral criteria and assigned a score from –2.0 to +2.0.[153] Applicants above a certain score were admitted; the rest were rejected. An applicant's TSI score had no weight in the edge read.[154]

Ashley Davis, who applied in 1996, had an SAT score of 980, a GPA of 2.94, and an academic index score of 2.21. Because her academic index was below the 2.3 cut-off for advancing to the second stage of the admissions process, the university turned down her application.[155] Craig Green, who applied in 1997, had an SAT equivalency score of 1170 to 1190, a GPA of 3.3, and an academic index score of

149. *Wooden*, 247 F.3d at 1266; *see also Wooden*, 32 F. Supp. 2d at 1374. In 1996, the university selected 75% of its class in the first stage. *Id.* In 1997, it selected 88% of its class in the first stage. *Tracy*, 59 F. Supp. 2d at 1316.

150. *Wooden*, 247 F.3d at 1266. Neither the court of appeals nor the district court indicated the minimum SAT score required for automatic admission.

151. *Id.* Those applicants also had to meet a minimum SAT score, which the court of appeals and district court again do not indicate.

152. *Id.* at 1266 & n.4. In the summer of 2000, following an adverse district court decision in the *Johnson* litigation, the university decided to stop considering race as a factor in undergraduate admissions until the *Johnson* litigation is resolved. *See* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1242 (11th Cir. 2001).

153. *Wooden*, 247 F.3d at 1266-67; *see also Tracy*, 59 F. Supp. 2d at 1317. "Despite extensive discovery, Green has not been able to show that UGA racially classified applicants at the [edge read] stage." *Tracy*, 59 F. Supp. 2d at 1318; *id.* at 1318 n.2 ("While Green has shown that the edge readers engage in a subjective process, the record evidence permits no reasonable inference that race plays a factor at this stage.").

154. *See id.* at 1317 ("[A]t the [edge read] stage, all applicants started at zero.").

155. *Wooden*, 247 F.3d at 1266.

2.39.[156] Although his scores were too low for automatic admission at the first stage, they were high enough to move his application to the second stage. At that stage, Green received a TSI score of 3.89, which included points for his Georgia residency, his parents' educational level, and his academic qualifications. He did not receive the 0.5-point credit given to nonwhite applicants that year. In 1997, the threshold for admission at the second stage was a TSI score of 4.40, and the threshold for rejection was 3.79. Because Green's TSI score fell in the middle, his application went to the third stage. Both edge readers who reviewed Green's application gave him the lowest score of –2.0. Because the cut-off for third-stage admission in 1997 was an edge read score of –0.5, Green was rejected.[157]

Tracy, Davis, and Green sued the university, challenging its race-conscious admissions process on various constitutional and statutory grounds. A close look at each plaintiff makes clear that not all of them were in a position to challenge the university's use of racial preferences. Moreover, the differences among them suggest a three-dimensional typology of unsuccessful white applicants.

Category 1: Ashley Davis and Craig Green

Let us look first at Ashley Davis. Davis was rejected under an admissions policy that took race into account only in the second stage of the selection process, but not in the first or third. Davis never reached the second stage; her application was turned down at the first stage because her academic index score did not meet the race-neutral threshold for avoiding automatic rejection. Racial preferences thus played no role in the university's decision. Indeed, not only would Davis have been rejected had there been no affirmative action at the second stage, she also would have been rejected had she been nonwhite. For this reason, the district court and Eleventh Circuit correctly concluded that Davis lacked standing to assert that the university denied her an opportunity to compete on an equal footing with all other applicants.[158]

What Davis's example suggests is that, for many white applicants, failure to gain admission has nothing to do with race.[159] Bowen and

156. *Tracy*, 59 F. Supp. 2d at 1317. Green scored 27 on a different college entrance exam, the ACT, which translated into an SAT score of 1170 to 1190. *See id.*

157. *Wooden*, 247 F.3d at 1267.

158. *See id.* at 1281-82 ("Simply put, at the only stage during which Davis's application was considered by UGA, she was plainly on an equal footing with all other applicants, and was deemed unqualified according to entirely race-neutral criteria."); Tracy v. Bd. of Regents of Univ. Sys. of Ga., No. CV 497-45, 2000 WL 1123268, at *10 (S.D. Ga. June 16, 2000); Wooden v. Bd. of Regents of Univ. Sys. of Ga., 32 F. Supp. 2d 1370, 1375-76 (S.D. Ga. 1999).

159. *See* Hopwood v. Texas, 999 F. Supp. 872, 883 (W.D. Tex. 1998) *on remand* (Sparks, J.) ("There is no basis in fact or logic to suggest . . . that all [white] applicants who were de-

Bok's statistical portrait of selective admissions confirms this point. The disparities in admission rates in their study show that the average white applicant is treated less favorably than the average black applicant, especially in the middle range of SAT scores. But again, what matters in a lawsuit is not how racial preferences affect the average white applicant, but rather how they affected the individual plaintiff.[160] In the 1200-1249 SAT interval, for example, although white applicants as a group would have had a 60% (instead of 19%) chance of admission had they been black,[161] the fact is that among white applicants facing a 60% success rate, 40% would still fail to gain admission. Like Ashley Davis, the white applicants in that 40% cannot claim they would have been admitted absent affirmative action, nor can they claim they were denied an opportunity to compete on equal footing with black applicants.

The percentage of white applicants like Ashley Davis varies from one SAT interval to another: 44% in the 1150-1199 range, 26% in the 1250-1299 range, 20% in the 1350-1399 range.[162] But taking into account the number of white applicants within each SAT interval, Bowen and Bok's data show that even if white applicants within each SAT interval were admitted at the rate for black applicants (ignoring practical limits on the total number of seats available), 36% of all white applicants — or nearly *half* of all rejected white applicants — still would not have gained admission.[163] This finding seems at once remarkable and unremarkable. It is remarkable because the conventional *Bakke* narrative contains not the slightest hint that affirmative

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nied admission . . . were denied admission substantially — or, for that matter, even in small part — because of race."); *id.* at 884 ("[A]n applicant who has no conceivable chance of admission cannot possibly show that race was a substantial or motivating factor in the . . . school's decision to deny him or her admission.").

160. *See supra* note 137; *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.) ("[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, *rather than the individual only because of his membership in a particular group* . . . ." (emphasis added)).

161. *Infra* Appendix, Table A, lines 6 and 8.

162. Had they been black, white applicants in the 1150-1199, 1250-1299 and 1350-1399 intervals would have faced admission rates of 56%, 74% and 80%, respectively, which means 26%, 20%, and 44% of those applicants would have been rejected regardless of race. *Infra* Appendix, Table A, line 6.

163. Bowen and Bok's study included 24,700 white applicants. From lines 4 and 6 of Table A in the Appendix, it is possible to calculate the number of white applicants that would have been admitted had they been black: (.170)(1062) + (.354)(593) + (.406)(939) + (.462)(1507) + (.555)(2,075) + (.600)(2816) + (.739)(3384) + (.646)(3878) + (.800)(3532) + (.696)(2766) + (.750)(1507) + (1.00)(642) = 15,839. If 15,839 white applicants would have been admitted under the admission rates for black applicants, then 8861 — or 35.9% — would have been rejected. Summing the figures in line 9 of Table A, we find that 6433 white applicants were actually admitted, which means 18,267 were actually rejected. The percentage who still would have been rejected under the black admission rates is 8861 divided by 18,267, or 48.5%.

action is wholly irrelevant to the fate of a substantial number of white applicants. It is unremarkable because it is obvious, on a moment's reflection, that the highly competitive nature of selective admissions means that many applicants, including many white applicants, will be rejected for reasons having nothing to do with race. White applicants like Ashley Davis, whose academic qualifications simply are not competitive regardless of race, have no standing to challenge affirmative action even on an equal-footing theory.

In contrast to Davis, Craig Green had an academic index score that was high enough to keep him from being rejected at the first stage of the university's admissions process, but not high enough for automatic admission. In the second stage, his application undeniably received less favorable treatment on the basis of his race. Had he not been white, his TSI score would have been 4.39 instead of 3.89, reflecting the 0.5-point credit for being nonwhite. Even a TSI score of 4.39, however, would not have satisfied the 4.40 threshold for second-stage admission. Green's application would have proceeded to the third stage of review regardless of his race, and in that stage, both edge readers gave him the lowest possible score on the basis of race-neutral criteria. In short, Green's application would have met the same outcome had he been white or nonwhite. Moreover, given his low score in the edge read, it is highly improbable that he would have gained one of the seats that would have been available absent the use of race in the second stage.

Does Green, whose application was subject to race-conscious review, stand in a better position to challenge the admissions policy than Davis? The district court thought not, concluding that "Green simply cannot show he was otherwise qualified to compete for admission equally with minority applicants."[164] "Every non-white applicant admitted at the TSI phase possessed a TSI score higher than Green's even *before* the addition of any ethnic/racial bonus points," the court observed,[165] and in the edge read, the university's "*final* decision to reject his application was not based on race."[166] But the Eleventh Circuit reversed on the ground that Green, unlike Davis, "has actually been *exposed* to unequal treatment."[167] According to the court of appeals, "the direct exposure to unequal treatment" is a cognizable injury-in-fact for purposes of standing.[168]

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164. Tracy v. Bd. of Regents of Univ. Sys. of Ga., No. CV 497-45, 2000 WL 1123268, at *11 (S.D. Ga. June 16, 2000).

165. Tracy v. Bd. of Regents of Univ. Sys. of Ga., 59 F. Supp. 2d 1314, 1320 (S.D. Ga. 1999).

166. *Id.* at 1318.

167. Wooden v. Bd. of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1279 (11th Cir. 2001).

168. *Id.* at 1280.

Green's case is not as clear-cut as Davis's, as the disagreement between the district court and the court of appeals suggests. Because his application reached the race-conscious TSI stage, it is not literally true that race played no role in his case. But to deny Davis standing while granting it to Green, as the Eleventh Circuit did, appears to elevate form over substance. For Green's case can be made identical to Davis's simply by bifurcating the TSI stage into two substages, the first race-neutral and the second race-conscious. In the race-neutral substage, the university would assign each applicant a TSI score accounting only for nonracial factors. It would then admit all applicants with a TSI score of at least 4.40, while sending all applicants with a TSI score from 3.79 to 3.89 to the edge read, whether white or nonwhite. In the race-conscious sub-stage, the university would adjust the remaining applicants' TSI scores to account for race. It would then admit applicants at 4.40 and above, reject applicants below 3.79, and send the rest to the edge read. Under this functionally equivalent process, Green's application would have passed directly from the first sub-stage to the edge read — where it would have been rejected — without ever having been exposed to unequal treatment based on race. In the context of Bowen and Bok's study, Green would join Davis among the ranks of white applicants who would not have been admitted even if their odds had been as favorable as the odds facing black applicants.

Green's example thus suggests an important distinction between "the inability to compete on an equal footing," which has been recognized by the Supreme Court as a cognizable injury in fact, and mere "exposure to unequal treatment," which has not. An equal-footing claim presumes that the white applicant is actually "able and ready" to compete on an equal footing with minority applicants, were it not for the university's consideration of race.[169] To qualify as "able and ready," a white applicant need not show that he would have been admitted under a race-neutral selection process. But at a minimum, he must show that he would have gained admission had he competed on an equal footing with minority applicants under the race-conscious process being challenged. A white applicant who cannot make that showing — who would have been rejected *even if accorded the same preference given to minority applicants* — cannot plausibly assert that, were it not for his race, he would have been "able and ready" to compete equally with minority applicants. That applicant should lack standing.

To be sure, the bare fact of exposure to unequal treatment on the basis of race is not inherently unactionable. Exposure alone is some-

169. Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993).

times capable of inflicting expressive or stigmatic harm.[170] But Green, predictably, has not alleged any non-instrumental harm. He does not contend that his exposure to unequal treatment at the TSI stage stigmatized him based on his race. Nor does he suggest that the admissions policy expressed contempt or racial prejudice toward him, or that it otherwise conveyed a message of racial inferiority or subordination.[171] I shall have more to say later about non-instrumental harm,[172] but for now it is enough to observe that it is far from clear how the university's consideration of race injured Green in a "concrete and particularized" way, any more than it injured Ashley Davis.[173] Green, like Davis, sued the university because he believed he was unfairly denied admission on the basis of his race. Yet his claim lacks any viable factual predicate. The Eleventh Circuit's view that Green's exposure to unequal treatment, without more, somehow tainted the university's decision to reject his application conceives of an injury to Green that is prohibitively abstract.[174] If this is correct, then the class of white applicants without standing to challenge affirmative action includes not only applicants like Davis for whom race played literally no role in the process of selection, but also applicants like Green for whom race played no role in the result.

Category 2: Kirby Tracy

Of course, each year many unsuccessful white applicants, unlike Green, would have been admitted had they been nonwhite. The third Georgia plaintiff, Kirby Tracy, is such an applicant. The record in Tracy's case is clear on two points. In the year he applied, he would have been admitted had he been black.[175] Nevertheless, he would not

170. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (stating that an official policy of "separate but equal" inflicts on members of a disfavored race "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

171. It seems implausible, in my view, to argue that programs designed to benefit members of historically disadvantaged groups actually express negative judgments about the moral worth and capacities of members of historically advantaged groups. With respect to intangible injury, Green is simply not in the same position as a black student exposed to unequal treatment against the historical backdrop of Jim Crow. *But cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.").

172. *See infra* notes 213-228 and accompanying text.

173. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding that plaintiff must have suffered a "concrete and particularized" injury in order to have constitutional standing).

174. *See id.*; City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) ("Abstract injury is not enough [for constitutional standing].").

175. *See* Wooden v. Bd. of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1265 (11th Cir. 2001).

have been admitted even if the university had not used racial preferences in its admissions process.[176] Under settled law, Tracy has standing to oppose the 1995 admissions policy on an equal-footing theory, regardless of whether he would have won admission under a race-neutral selection process.[177] Applicants like Tracy are thus positioned to challenge the merits of affirmative action without relying on the illogic of the causation fallacy. Nevertheless, as the Supreme Court explained in its most recent encounter with affirmative action in university admissions, *Texas v. Lesage*,[178] the issue of causation remains important as a potential limitation on the range of legal claims available even to such applicants.

Lesage involved the use of racial preferences by a University of Texas doctoral program. François Lesage, a white African immigrant, was one of 223 applicants to the Ph.D. program in 1996. The school rejected Lesage but offered admission to "roughly 20 candidates," including "at least one minority candidate."[179] Lesage asserted various claims against the school, including a § 1983 claim for damages arising from the school's rejection of his application. In district court, the school won summary judgment by establishing beyond dispute that Lesage would not have been admitted even if the admissions process had been race-neutral.[180] The Fifth Circuit reversed on the ground that the summary judgment inquiry should have focused on " 'whether the state violated Lesage's constitutional rights by rejecting his application in the course of operating a racially discriminatory admissions program.' "[181] According to the Fifth Circuit, an applicant rejected under a race-conscious review process has " 'suffered an implied injury' — the inability to compete on an equal footing."[182]

The Supreme Court in turn reversed, explaining that "[u]nder *Mt. Healthy City Bd. of Ed. v. Doyle*, even if the [school] has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration."[183]

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176. *See* Tracy v. Bd. of Regents of Univ. Sys. of Ga., No. CV 497-45, 2000 WL 1123268, at *7, *11 (S.D. Ga. June 16, 2000).

177. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995); Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993).

178. 528 U.S. 18 (1999) (per curiam).

179. *Id.* at 19.

180. *See id.* at 19-20. It was undisputed that "[a]t least 80 applicants had higher undergraduate grade point averages (GPA's) than Lesage, 152 applicants had higher Graduate Record Examination (GRE) scores, and 73 applicants had both higher GPA's and higher GRE scores." *Id.* at 19. Moreover, neither Lesage's personal statement nor his letters of recommendation strengthened his application. *See id.*

181. *Id.* at 20 (quoting Lesage v. Texas, 158 F.3d 213, 222 (5th Cir. 1998)).

182. *Id.* (quoting *Lesage*, 158 F.3d at 222).

183. *Id.* at 20-21 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

In *Mt. Healthy*, a teacher named Fred Doyle alleged that the school had unlawfully terminated him in retaliation for disclosing an internal memorandum to a local radio station.[184] In refusing to renew Doyle's contract, the school cited unprofessional conduct that included not only his disclosure of the memo, but also an incident in which he made obscene gestures to students in the school cafeteria.[185] While agreeing with Doyle that the radio station incident involved constitutionally protected speech,[186] the Court held that the school's action, even if substantially motivated by Doyle's protected conduct, "would [not] necessarily amount to a constitutional violation justifying remedial action."[187] The Court observed that it is "necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused" for purposes of determining liability in certain areas of constitutional law.[188] Although the school "considered constitutionally protected conduct in deciding not to rehire Doyle," it was not "precluded . . . from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event."[189] "A borderline or marginal candidate," the Court said, "ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record."[190]

Lesage extended *Mt. Healthy*'s "test of causation" to the equal protection context.[191] The Court unanimously held that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983."[192] While stating that a causation defense has no applicability where "a plaintiff . . . challenges an ongoing

184. *Mt. Healthy*, 429 U.S. at 282-84.

185. *Id.* at 282-83 & n.1. Doyle's record also included an argument with another teacher resulting in a suspension that was later rescinded, an argument with school cafeteria employees over the amount of spaghetti he had been served, and an incident in which he referred to students, in connection with a disciplinary complaint, as "sons of bitches." *Id.* at 281-82.

186. *Id.* at 284.

187. *Id.* at 285.

188. *Id.* at 286. The Court observed that the "test of causation" had been applied in cases involving due process challenges to allegedly involuntary confessions. *Id.*

189. *Id.* at 286.

190. *Id.*

191. Recognizing that "previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination," the Court said "that distinction is immaterial. The underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive." Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam).

192. *Id.*

race-conscious program and seeks forward-looking relief," the Court made clear that "where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability."[193]

Taken at face value, *Lesage* means that a white plaintiff like Tracy, for whom a defendant institution can make a same-decision showing, has no viable § 1983 claim. The Court regarded a same-decision showing as a complete defense to § 1983 *liability*, not merely as a defense to certain remedies. Tracy's best recourse, *Lesage* suggests, is to challenge the admissions policy through a claim for "forward-looking relief," supported by an "allegation of an ongoing or imminent constitutional violation."[194] To maintain such a claim, Tracy "need not affirmatively establish that he would receive the benefit in question if race were not considered."[195] *Lesage* thus circumscribes the range of substantive claims available to white applicants who seek to challenge affirmative action. Even a plaintiff properly positioned to assert an equal-footing claim cannot succeed under § 1983 if the defendant university is able to expose the causation fallacy with respect to that plaintiff. *Lesage* is not framed as a case about standing, but the rule it announces seems functionally equivalent to a holding that a same-decision showing defeats the standing of a white applicant seeking to use § 1983 to challenge affirmative action.[196]

Although *Lesage* and its implications appear straightforward, the decision is susceptible to some doubt. The holding appears to be a rather awkward solution for the Court's stated goal of preventing a § 1983 plaintiff from achieving an outcome that would not have re-

193. *Id.*

194. *Id.* Although *Lesage* leaves open this possibility for white applicants in Tracy's position, Tracy himself is unable to take advantage of it. After he was rejected by the University of Georgia, Tracy enrolled at another college. *See* Wooden v. Bd. of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1265 (11th Cir. 2001). Two years later, he won admission to the University of Georgia as a transfer student and remained a student there during the litigation. *Id.* Under *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), a plaintiff seeking prospective injunctive relief must allege a "real and immediate" threat of future injury arising from unlawful conduct. The Eleventh Circuit determined that, under *Lyons*, Tracy lacks standing to seek forward-looking relief. Finding "no evidence that he intends to reapply for admission to UGA under any version of the freshman admissions policy," the court of appeals concluded that "[t]here is no likelihood . . . that he will ever again be exposed to UGA's allegedly discriminatory freshman admissions process." *Wooden*, 247 F.3d at 1284-85.

195. *Wooden*, 247 F.3d at 1286 (quoting *Lesage*, 528 U.S. at 21).

196. The district court in the Georgia litigation read *Lesage* as "enunciat[ing] a standing requirement." Tracy v. Bd. of Regents of Univ. Sys. of Ga., No. CV 497-45, 2000 WL 1123268, at *9 (S.D. Ga. June 16, 2001). But the Eleventh Circuit maintained that a same-decision showing under *Lesage* goes to the merits of a § 1983 claim, not to standing. *See Wooden*, 247 F.3d at 1280.

sulted in the absence of the defendant's allegedly unconstitutional conduct.[197] As some commentators have argued, a same-decision showing should be understood as bearing on the issue of remedy, not liability.[198] After all, the fact that Tracy would have been rejected had he competed in a race-neutral process does not mean that he would have been rejected had he competed on an equal footing with black applicants in the race-conscious process being challenged. Indeed, *Lesage* recognized that the denial of admission is an injury distinct from the denial of opportunity to compete on an equal footing.[199] A same-decision showing negates the first type of injury, but not the second.

It thus seems incorrect to say that a § 1983 plaintiff who asserts a valid equal-footing claim has suffered "no cognizable injury warranting relief" if it is shown that he would not have been admitted absent racial preferences.[200] Even if Tracy is not entitled to an order of admission or actual damages resulting from his denial of admission, he is at least entitled to nominal damages if he prevails on the merits of his equal-footing claim.[201] The law should not make a § 1983 plaintiff better off than he would have been absent the alleged constitutional violation, but it also should not make the plaintiff worse off. Yet that is what results when a § 1983 plaintiff who establishes that "the government has considered an impermissible criterion in making a decision adverse to [him]"[202] is foreclosed from obtaining nominal damages in recognition of the violation.

Such a result is in substantial tension with the Supreme Court's holding in *Carey v. Piphus* that a § 1983 plaintiff who has shown a procedural due process violation but no consequential harm may recover nominal damages to vindicate the constitutional right.[203] *Lesage*, a per

197. *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (describing the policy objectives underlying the Court's holding).

198. *See, e.g.*, Sheldon Nahmod, Mt. Healthy *and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 610-17 (2000); Christina B. Whitman, *An Essay on* Texas v. Lesage, 51 MERCER L. REV. 621, 632-34 (2000).

199. *See Lesage*, 528 U.S. at 21-22.

200. *Id.* at 21.

201. Observing that *Lesage* was limited to § 1983, the district court held that Tracy had succeeded in showing that the university's admissions process violated Title VI and that he was entitled to nominal damages under Title VI. *See Tracy*, 2000 WL 1123268, at *11-*12.

202. *Lesage*, 528 U.S. at 20.

203. *See* 435 U.S. 247, 248 (1978). The tension between *Lesage* and *Carey* has been noted elsewhere. *See Tracy*, 2000 WL 1123268, at *9-*10; Nahmod, *supra* note 198, at 611-12; Whitman, *supra* note 198, at 632-34. *Carey* was a procedural due process case involving the suspension of two high school students without an adjudicatory hearing. The Court held that while substantial damages under § 1983 for a deprivation of procedural due process must be proven and may not be presumed, *see Carey*, 435 U.S. at 262-65, "the denial of procedural due process should be actionable for nominal damages without proof of actual injury," *id.* at 266 (citations omitted). "Even if respondents' suspensions were justified, and even if they did

curiam opinion issued without briefing or oral argument, did not mention *Carey*, nor did it address the issue of nominal damages.[204] It is possible that *Lesage* reflects a silent effort by the Court to cabin *Carey* and thereby reduce incentives for civil rights litigation.[205] But given the special solicitude that the current Court has shown toward the claims of white plaintiffs challenging affirmative action, it would not be surprising to see *Lesage* modified or limited in a future case brought by a § 1983 plaintiff who seeks nominal damages on an equal-footing claim.

Category 3: Allan Bakke?

Finally, the cases of Davis, Green, and Tracy are as noteworthy for the narratives they reveal as for the one they do not. In every process of selective admissions that uses racial preferences, there is a small group of white applicants who not only would have been admitted had they been nonwhite, but also would have been admitted had the process been completely race-neutral. These are the applicants who account for the marginal effect of affirmative action on the odds of admission facing the pool of white applicants taken as a whole. Such applicants, of course, are in the strongest position to challenge affirmative action; they are legitimate purveyors of the *Bakke* narrative. With respect to this group, there can be no doubt that racial preferences present very serious problems of fairness.

It is important to note, however, that the absence of an example from this group in the Davis-Green-Tracy litigation is not an accident. In the current round of legal challenges to affirmative action, one searches in vain for examples of plaintiffs who convincingly fit the *Bakke* paradigm.[206] The reason appears to be two-fold. First, such ap-

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not suffer any other actual injury," the Court explained, "the fact remains that they were deprived of their right to procedural due process." *Id.* "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury." *Id.*

204. *Cf. Lesage*, 528 U.S. at 19 ("Lesage filed suit seeking *money* damages and injunctive relief." (emphasis added)).

205. *Lesage* is broadly consistent with other recent decisions reducing incentives for civil rights litigation. *See* Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res., 532 U.S. 598, 603-04 (2001) (limiting "prevailing party" entitled to attorneys' fees under various civil rights statutes to a party who has secured a judgment on the merits or a court-ordered consent decree); Farrar v. Hobby, 506 U.S. 103, 115 (1992) (stating that for a § 1983 plaintiff who wins nominal damages but no compensatory damages, "the only reasonable [attorneys'] fee is usually no fee at all").

206. We have already seen that Davis, Green, Tracy, and Bakke do not fit the mold. Similarly, in *Lesage*, all evidence indicated that the plaintiff would not have been admitted to the University of Texas doctoral program even if the school's admissions process had been colorblind. *See* 528 U.S. at 19-20 (quoting the district court's conclusion that "any consideration of race had no effect on this particular individual's rejection"); *see also supra* note 180. In *DeFunis v. Odegaard*, the rejected white plaintiff, Marco DeFunis, was among the bottom thirty-three applicants on a waiting list consisting of 155 applicants for a first-year law school

plicants are statistically quite rare. The number of white applicants displaced by minority applicants who may be said to have benefited from affirmative action — i.e., who are admitted in the margin between a hypothetical race-neutral admission rate and the actual minority admission rate — is extraordinarily small compared to the total number of white applicants who fail to gain admission. Using the yield-adjusted race-neutral admission rates in Table 2, we can calculate the total number of white applicants in Bowen and Bok's study who would have been admitted in the absence of racial preferences.[207] If we were to subtract from that total the number of white applicants who actually were admitted in Bowen and Bok's study, we would find that the difference represents only 1.5% of the white applicants who

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class with an enrollment limit of 150. *See* 507 P.2d 1169, 1176 (Wash. 1973), *dismissed as moot*, 416 U.S. 312 (1974). Ultimately, the school removed DeFunis from the waiting list and rejected him. At that time, "275 students were admitted," and "55 students remained on the waiting list." 507 P.2d at 1176; *see id.* (twenty-nine applicants with a higher academic ranking than DeFunis were denied admission). In *Hopwood*, through an evidentiary analysis described by the Fifth Circuit as "painstakingly thorough" and "eminently correct," Hopwood v. Texas, 236 F.3d 256, 272 (5th Cir. 2000), the district court determined that none of the four plaintiffs would have been admitted to the University of Texas Law School had the admissions process been race neutral. *See* Hopwood v. Texas, 999 F. Supp. 872, 893-901 (W.D. Tex. 1998). The available records of the University of Washington and University of Michigan lawsuits do not contain any findings on this issue.

I am aware of only one reported case (other than *Bakke*) where a federal court has found that a white plaintiff would have been admitted in the absence of racial preferences. *See* Johnson v. Bd. of Regents of Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1376-77 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001) (invalidating the University of Georgia's admissions policy). Yet in that case, the finding is far from convincing. There, after observing that under *Lesage* the university could avoid liability if it could make a same-decision showing, the district court determined that the university failed to carry its burden of proving that two plaintiffs, Aimee Bogrow and Molly Ann Beckenhauer, would not have been admitted even under a race-neutral system. Based on the published opinion, however, it appears that the university did not make any attempt to meet its evidentiary burden. The opinion reviews and rejects statistical evidence offered by intervenors in the case, but nowhere does it suggest that the university offered any evidence of its own. Tellingly, the district court observed:

> The evidentiary showing *Mt. Healthy* requires, incidentally, is not difficult to understand. UGA could have made a same-decision showing by demonstrating, for example, that: (a) 1000 applicants were denied admission at the TSI stage; and (b) after re-ranking all the TSI-stage applicants (applying all but the race and gender TSI factors), the plaintiffs ranked among the bottom 1,000 applicants. But it has not done this . . . .

Id. at 1377. Beckenhauer, it should be noted, would have been rejected even if she had received the 0.5-point credit given to minority applicants. *See id.* at 1365-66 (TSI cut-off for proceeding to the edge read was 4.66; Beckenhauer's TSI was 4.06). She thus stands in the same position as Ashley Davis and Craig Green. Bogrow was a stronger applicant; like Kirby Tracy, she would have been admitted had she been a minority applicant. *See id.* (Bogrow's TSI was 4.52; applicants above 4.92 were automatically admitted). But that fact, as Tracy's example shows, does not mean Bogrow would have been admitted under a race-neutral process.

207. Yield-adjusted race-neutral admission rates appear in Table 2 as well as line 10 of Table B of the Appendix. Line 4 of Table A of the Appendix gives the number of white applicants within each SAT interval. The number of white applicants who would have been admitted under yield-adjusted race-neutral admission rates is (.067)(1062) + (.117)(593) + (.155)(939) + (.162)(1507) + (.209)(2075) + (.206)(2816) + (.238)(3384) + (.254)(3878) + (.308)(3532) + (.398)(2766) + (.508)(1507) + (.627)(642) = 6,701.

actually were rejected.[208] The dearth of bona fide *Bakke* plaintiffs thus directly reflects the dearth of such applicants. Bakke himself, we have learned, did not provide a genuine example.

At any given institution, moreover, a further consideration tends to lessen the likelihood that an applicant with a legitimate complaint of displacement will go to court. A white applicant who seeks admission to a particular school, but is displaced by affirmative action, is necessarily one who has come very close to being admitted. If an applicant of that caliber were to apply to several comparable schools, it seems improbable that she would be rejected in every instance. An applicant who is truly close to the cusp of admission at one institution will more than likely fall on the other side of the cusp at one of the other institutions to which she applied. Such an applicant makes an unlikely plaintiff. If, for example, a white student applies to ten selective schools and, though rated highly at each school, is rejected by all but one or two, the applicant may have legitimate grounds for complaining that she was displaced as a result of affirmative action. But because she has gained admission to one or two schools of comparable quality, her incentive (and, I suspect, psychological urge) to file a lawsuit is considerably attenuated. In this regard, it is interesting to note that in 1973, Allan Bakke failed to gain admission not only to the Davis Medical School, but also to ten other medical schools to which he applied.[209] Bakke, like most white applicants and plaintiffs, was not close to the cusp.

C. *Summary*

Not all unsuccessful white applicants are similarly situated with respect to the impact of racial preferences in selective admissions. From the Georgia examples, three distinct categories emerge. Category 1 consists of white applicants who neither would have been admitted had there been no racial preferences nor would have been admitted had they been nonwhite. This category includes not only applicants like Ashley Davis, whose application was denied on the basis of wholly race-neutral criteria, but also applicants like Craig Green, whose application was exposed to unequal treatment but ultimately denied on race-neutral grounds. Category 1 applicants are not rare; in Bowen and Bok's study, they account for nearly half of all rejected

208. We observed previously that 6433 white applicants were actually admitted and that 18,267 white applicants were actually rejected. *See supra* note 163. Thus, eliminating racial preferences would have increased the number of admitted white applicants by 268 (6701 minus 6433), which amounts to 1.5% of rejected white applicants.

209. *See* Amici National Urban League, *supra* note 32, at 12 n.6 (observing that Bakke was rejected by Bowman-Gray, University of South Dakota, University of Cincinnati, Wayne State University, Georgetown University, Mayo, UCLA, San Francisco, Stanford and University of Minnesota).

white applicants. Category 2 consists of white applicants who would not have been admitted had there been no racial preferences but, unlike Davis and Green, would have been admitted had they been nonwhite. Kirby Tracy falls into Category 2, and these applicants also compose slightly less than half of the unsuccessful white applicants in Bowen and Bok's sample. Finally, Category 3 consists of white applicants who not only would have been admitted had they been nonwhite but also, unlike Tracy, would have been admitted had there been no racial preferences. The conventional yet erroneous view is that Allan Bakke belongs to this group, which accounts for less than 2% of the rejected white applicants in Bowen and Bok's study.[210]

Notably, this typology is not contingent on the particular characteristics of the Georgia admissions process. If a selective institution attracts far more white applicants than available seats, and if it admits far more white applicants than minority applicants, then the white applicants it rejects may be grouped into the categories described above, however the institution chooses to structure its use of race in admissions. Moreover, what is important in this breakdown is not the absolute precision of the percentages; one might expect the numbers to vary somewhat from institution to institution. What is important, rather, is a feel for relative magnitudes. The story of Allan Bakke, however compelling it may be in public discourse on affirmative action, captures only the tiniest sliver of the real impact of racial preferences on white applicants.

Altogether absent from the *Bakke* narrative are the Category 1 stories of Ashley Davis, Craig Green, and the large percentage of rejected white applicants whose failure to gain admission cannot be attributed in any way to their race. The size of this group is a powerful testament to the sheer statistical realities of selective admissions: So steep are the odds that not only do the vast majority of unsuccessful white applicants have no plausible claim that they were displaced by minority admittees, but a substantial number (close to half) have no plausible claim that race had anything to do with their rejection. The undue prominence of the Category 3 narrative directly reflects the invisibility of Category 1 applicants in the affirmative action debate.

Category 3's exaggerated significance is also attributable in part to the linguistic elision of Category 2 claims with Category 3 claims. Both categories of applicants may properly claim they were denied admission "because of race." Indeed, both have standing to challenge af-

210. Theoretically, there is a fourth category consisting of white applicants who would not have been admitted had they been nonwhite but would have been admitted had there been no racial preferences. Given the substantial variation in admissions processes, I cannot say with total certainty that no white applicants fall into such a category. But because all evidence suggests that it is far more difficult for a rejected white applicant to have gained admission in the absence of racial preferences than with the benefit of a racial preference, it seems safe to assume the fourth category is a null set.

firmative action. It is not always true, however, that a white applicant who would have been admitted had she been able to benefit from a racial preference also would have been admitted had the admissions process employed no racial preferences at all. In fact, the vast majority of such applicants would have been rejected even under a race-neutral process. The conventional narrative, in addition to omitting Category 1, makes no effort to distinguish between Category 2 and Category 3. As a consequence, the narrative captures none of the most typical effects of affirmative action on white applicants, even as it portrays the truly exceptional case as the rule.

IV. RESHAPING THE DEBATE

At the outset, I stated that my intention in this Article was not to resolve the ultimate fairness or constitutionality of affirmative action. The causation fallacy gives rise to a distorted understanding of how affirmative action affects white applicants. But exposing its illogic does not abolish the standing of every white plaintiff, nor does it refute every legal claim a proper plaintiff might assert. If it is true, as I suspect, that white applicants in Category 3 make unlikely plaintiffs, and if courts continue to deny standing to Category 1 applicants, then the constitutionality of affirmative action will likely be settled in a case brought by an applicant in Category 2. Such an applicant will resemble Allan Bakke: strong enough to gain admission had he been a minority applicant, but not strong enough to gain admission had there been no racial preferences. Under current law, as long as the plaintiff seeks prospective relief, dispelling the causation fallacy will not settle the merits of his case.[211]

Nevertheless, recognizing the causation fallacy is important to evaluating the constitutional merits of affirmative action to the extent that it narrows and focuses the nature of the burden affirmative action imposes on white applicants. The application of strict scrutiny, while doctrinally elaborate, inevitably tends to reflect some fundamental understanding and balancing of the burdens and benefits associated with the challenged policy. As Justice Marshall observed three decades ago, the degree of rigor actually exercised by a court in scrutinizing a particular classification typically depends on "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[212] The second factor, which inquires into the nature and se-

211. *See supra* notes 194-195 and accompanying text (discussing Texas v. Lesage, 528 U.S. 18 (1999)).

212. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (quoting Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting));

verity of the deprivation caused by the classification, finds expression in modern narrow tailoring analysis. Although the Supreme Court has not defined precisely what narrow tailoring demands in the context of race-conscious admissions, the impact of affirmative action on white applicants will be a relevant factor.[213] A proper characterization of that impact is therefore essential to assessing the legal merits of affirmative action.

By clarifying that displacement is not the most widespread harm suffered by white applicants, dispelling the causation fallacy has the important consequence of forcing a closer examination of exactly how affirmative action harms white applicants, especially those in Category 2, the applicants most likely to become litigants. Category 2 applicants are plainly disadvantaged by their ineligibility for a racial preference; had they been evaluated on an equal footing with minority applicants, they would have been admitted. When Category 2 applicants go to court, however, what they seek is not an admissions process that entitles them to a preference on par with the preference given to minority applicants. What they seek, rather, is a process that employs no racial preferences at all. Yet under such a process, Category 2 applicants would meet the same fate as they would under a race-conscious process: They would be rejected. Thus, no coherent relation between the type of unfairness complained of and the type of fairness sought can be forged from a consideration of tangible harm. The desired remedy, while greatly reducing the number of minority admittees and replacing them with white applicants in Category 3, would not alter any outcomes for white applicants in Category 2.

Ultimately, for Category 2 applicants, the complaint of unequal treatment must hinge on some form of intangible injury. As I stated earlier, the notion that affirmative action expresses racial prejudice against white applicants is, in my view, a nonstarter,[214] and I know of no reported case in which a white plaintiff has relied on such a theory. Separate from that notion, however, is the concern that an admissions process that uses racial preferences as a means of enhancing educational diversity runs the risk of stereotyping white applicants. Racial

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see also Craig v. Boren, 429 U.S. 190, 211-12 (Stevens, J., concurring) ("There is only one Equal Protection Clause. . . . I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.").

213. *See* United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion) (narrow tailoring depends in part on "the impact of the [race-conscious action] on the rights of third parties"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281-83 (1986) (plurality opinion) (evaluating burden on innocent parties imposed by race-based hiring goals as part of narrow tailoring inquiry); Tuttle v. Arlington County Sch. Bd. 195 F.3d 698, 707 (4th Cir. 1999) (considering "the burden of the Policy on innocent third parties" in evaluating whether a local school district's race-conscious admissions policy was narrowly tailored).

214. *See supra* note 171 and accompanying text.

stereotyping afflicts white applicants when a university's admissions process, in pursuing educational diversity, expresses illegitimate assumptions about the viewpoints and experiences of white applicants in relation to their minority counterparts. In other words, membership in a minority racial group may not be used as the sole or primary means for classifying applicants into those who are able and those who are unable to contribute to educational diversity.

The Eleventh Circuit's recent opinion striking down the University of Georgia's admissions policy invoked precisely this line of reasoning in defining the harm suffered by white applicants.[215] An admissions policy premised on educational diversity, the Eleventh Circuit said, may not take race into account while "permit[ting] no favorable treatment of [white] applicants whose personal backgrounds or skills . . . undeniably promot[e] diversity."[216] Depending on the institution and its mission, such applicants may include

> [i]ndividuals who come from economically disadvantaged homes; individuals who have lived or traveled widely abroad; individuals from remote or rural areas; individuals who speak foreign languages; individuals with unique communications skills (such as an ability to read Braille or communicate with the deaf); and individuals who have overcome personal adversity or social hardship.[217]

The point is that "when a university, in the name of student body diversity, grants preferential treatment to some applicants based on race, it must ensure that applicants are fully and fairly examined as individuals for their potential contributions *beyond race* to diversity."[218] A university that fails to do so "unfairly burden[s] 'innocent' third parties — specifically, white applicants, or more particularly, white applicants who may have greater potential to enhance student body diversity" than minority applicants.[219]

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215. *See* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001). Conspicuously, and to its credit, the Eleventh Circuit nowhere identified displacement as a harm to white applicants, even though the district court had ordered the admission of two of the three plaintiffs on the ground that the university failed to prove they would not have been admitted in the absence of affirmative action. *But cf. supra* note 206 (discussing weakness of district court's determination).

216. *Johnson*, 263 F.3d at 1255.

217. *Id.*

218. *Id.* at 1257.

219. *Id.* at 1260. The Eleventh Circuit determined that the University of Georgia's admissions policy failed in this regard on two counts. First, the second stage of review (the TSI stage), while including race as a diversity factor, did not include a sufficiently broad range of nonracial factors to ensure that "an applicant's true potential to contribute to diversity is ever fully and fairly assessed." *Id.* at 1258. "[T]o take only one example, an applicant who has spent her summers performing volunteer work in a less developed 'third world' country presumably would add far more diversity to the class than many of her peers who worked at more ordinary and less challenging summer jobs, yet at the TSI stage the uniqueness of her experience is wholly ignored." *Id.* at 1255. Second, the degree of preference given to nonwhite applicants at the TSI stage was "disproportionate to the very few [nonracial] diversity-

In a diversity-based admissions program, the risk of improper stereotyping is no doubt real and raises valid constitutional concerns that have been recognized by the Supreme Court.[220] Aware of the complexity in this area,[221] I am not inclined to expand this Article into a theory of whether and when stereotyping is constitutionally permissible. That is a topic for another day. Here I am content to offer three limited observations. First, the stereotyping argument, as asserted by

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related factors that may permissibly be considered at that stage, and quite plainly [was] considerable relative to the many factors relating as much if not more directly to diversity that the TSI formula wholly *excludes*." *Id.* at 1257. "[B]y weighing race so heavily, UGA necessarily discounts other non-academic factors in the TSI that may in some instances be far more accurate barometers for diversity." *Id.* at 1258.

In this regard, the personal stories of well-known white plaintiffs like Jennifer Gratz and Cheryl Hopwood have particular salience. Gratz, a good student with many extracurricular involvements, came from a working-class home where neither parent had finished college. *See* Cohen, *supra* note 9. Hopwood, the mother of a severely disabled child, applied to law school at age twenty-eight after working all through high school and then putting herself through community college and a four-year bachelor's program at a non-selective state school. *See* Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir. 1996) ("Her circumstance would bring a different perspective to the law school."); Hopwood v. Texas, 999 F. Supp. 872, 903 (W.D. Tex. 1998); Richard Bernstein, *Racial Discrimination or Righting Past Wrongs?*, N.Y. TIMES, July 13, 1994, at B8 ("Ms. Hopwood's father died when she was a girl and she was reared under difficult circumstances by her mother."). Both Gratz and Hopwood had solid academic credentials (indeed, many applicants with similar credentials were admitted in the years they applied), and both overcame disadvantages. But elite schools traditionally have not sought out applicants with the social, educational, or economic profile of Gratz's family or Hopwood's. *See Pricing the Poor Out of College*, N.Y. TIMES, Mar. 27, 2002, at A22 (criticizing "a national system that is directing more and more its resources at middle- and upper-income students"). It is worth questioning whether white applicants like Gratz and Hopwood, instead of attacking affirmative action, might do better to urge top schools committed to genuine educational diversity to place a higher premium on first-generation college attendance or growing up in a blue-collar home. *See id.* (finding Mount Holyoke and Smith Colleges noteworthy because they "have historically taken it upon themselves to seek out first-generation college students as well as women who are returning to school after motherhood or careers"); *cf.* Sturm & Guinier, *supra* note 75, at 992 ("Cheryl Hopwood . . . do[es] not see the class-based connection between [her] own exclusion and that of the beneficiaries of affirmative action.").

220. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) ("[Racial gerrymandering] reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes."); Georgia v. McCollum, 505 U.S. 42, 59 (1992) ("This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. . . . We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.").

221. For commentary examining racial stereotyping in other legal contexts, including law enforcement, broadcast licensing, jury selection, and voting rights, see, for example, Leonard M. Baynes, *Paradoxes of Racial Stereotypes, Diversity and Past Discrimination in Establishing Affirmative Action in FCC Broadcast Licensing*, 52 ADMIN. L. REV. 979 (2000); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996); and David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001).

white applicants, is separate and distinct from the concern that affirmative action stereotypes *minority* applicants. Affirmative action, it has long been argued, imposes a damaging stigma of inferiority on all minority students, whether or not they have actually benefited from affirmative action. Moreover, when implemented to promote educational diversity, racial preferences may generate an expectation that minority students will represent a particular "minority perspective" both inside and outside the classroom. These concerns are legitimate, and in my view the assumption of inferiority fostered by racial preferences may well be the most powerful objection to affirmative action.[222]

My point here, however, is that such stereotyping concerns are not ones that *white* plaintiffs have any standing to raise. Indeed, the person best positioned to raise these issues is a minority student who would have been admitted, or was in fact admitted, without any benefit from affirmative action. Yet minority students who have intervened in the current wave of lawsuits have not gone to court in order to raise stereotyping concerns. Instead, they have sought to preserve affirmative action policies by supplementing diversity rationales with remedial rationales.[223] It would thus be ironic — and not a little disingenuous — for a white plaintiff challenging affirmative action to prevail on the ground that racial preferences hurt minority students.

Second, the claim that affirmative action improperly stereotypes white applicants is also distinct from the claim that race is altogether irrelevant to educational diversity. The latter claim appears most starkly in *Hopwood*, where the Fifth Circuit declared that the consideration of race in choosing students "is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."[224] Yet in the context of educational diversity, the notion that race is an arbitrary attribute, on par with "physical size or blood type," seems difficult to square with reality.[225] Children of different races grow up with different social and cultural experiences, and "these differences of experience in turn shape attitudes, producing characteristically different beliefs and judgments about society as a whole, and contrasting impressions of the relation" among various races.[226] Moreover, racial differences of experience are exacerbated by

222. *See generally* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990).

223. *See, e.g.*, *Johnson*, 263 F.3d 1234, at 1264-65; Gratz v. Bollinger, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

224. Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996).

225. For an impressive compilation of empirical evidence demonstrating the relation between racial diversity and educational goals, see Compelling Need, *supra* note 75 (containing expert reports in the University of Michigan litigation).

226. Kronman, *supra* note 14, at 879. *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

continuing and even worsening patterns of residential and educational segregation.[227] Indeed, there is nothing remarkable in the observation that "[b]lacks and Hispanics — and, to varying degrees, other ethnic minorities as well — have an experience of life different from that of their white counterparts and as a result form different judgments about the organization of American society and the integrity and fairness of its basic institutions," such as the police, courts, schools, banks, and private businesses.[228] The common-sense truth of this proposition focuses the stereotyping argument asserted by white plaintiffs not on the wholesale arbitrariness of race in admissions, but on the arbitrariness of taking race into account *without also* taking into account other personal attributes relevant to educational diversity. The argument is not that race is an irrelevant factor, but that race is not the only relevant factor.

Finally, and most importantly, understanding the harm to white applicants from racial preferences in terms of stereotyping as opposed to displacement tends to frame the affirmative action debate in less polarizing terms. The causation fallacy fundamentally conceives of affirmative action as a policy that pits minority applicants against whites. That conception invites courts, policymakers, and commentators to be either "for" or "against" affirmative action: Either the ends served by affirmative action are worthy enough to warrant the admission of minority applicants at the expense of whites, or they are not. But such a conception is accurate only for a category of white applicants who are very few in number and not particularly prone to complain in court. The risk of racial stereotyping affects a far greater number of white applicants. Evaluating affirmative action against this concern has the salutary consequence of defusing the simple opposition between minorities and whites, while centering the debate over racial preferences on the facts of how a specific policy actually works when applied to white and minority applicants. There are many ways a university might

227. *See* Gary Orfield & John T. Yun, Resegregation in American Schools, The Civil Rights Project, Harvard University, *at* http://www.law.harvard.edu/civilrights/publications/resegregation99.html (June 1999); Compelling Need, *supra* note 75.

228. Kronman, *supra* note 14, at 880; *see also* Richard Morin & Michael H. Cottman, *Discrimination's Lingering Sting: Minorities Tell of Profiling, Other Bias*, WASH. POST, July 22, 2001, at A1 (reporting results of national survey by Harvard University, Kaiser Foundation, and Washington Post comparing the frequency with which blacks, Hispanics, Asians, and whites report experiences of discrimination, profiling, and intolerance); Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST, July 11, 2001, at A1 (relating similar national survey showing that "large numbers of white Americans incorrectly believe that blacks are as well off as whites in terms of their jobs, incomes, schooling and health care"). Importantly, the claim here is not that race is a proxy for other characteristics that genuinely further the university's interest in educational diversity. For a university that seeks educational diversity, an applicant's status as a black American is valuable insofar as growing up black in America gives rise to an overall life experience that is different from growing up white, just as growing up on a farm in Idaho produces a life experience different from growing up on the streets of Boston. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (opinion of Powell, J.). Blackness, of course, is not a proxy for growing up black; it is one and the same.

attempt to assess the potential contributions to educational diversity of each applicant, and there are many ways a university might fail in this regard. The key point is that the grievances of white applicants cannot be meaningfully evaluated through a generalized balancing of tangible costs and benefits. What is required is a nuanced examination of how a particular affirmative action policy operates and how its operation does or does not accord each applicant equal dignity.

In all likelihood, this type of scrutiny would have the effect of forcing universities to assume a greater administrative burden in designing and implementing their admissions processes. Individualized review of each applicant's file would become the norm, regardless of the volume of applicants. But the imposition of such a burden would be well justified. It seems not too much to require a university that defends affirmative action on the basis of educational diversity to show that its admissions process is genuinely designed to achieve educational diversity.[229] Affirmative action is not unqualifiedly good, nor is it unqualifiedly bad. As the First Circuit observed in a recent case challenging the Boston Latin School's race-conscious admissions policy,

> an inquiring court cannot content itself with abstractions. . . . [W]e must look beyond the School Committee's recital of the theoretical benefits of diversity and inquire whether the concrete workings of the Policy merit constitutional sanction. Only by such particularized attention can we ascertain whether the Policy bears any necessary relation to the noble ends it espouses. In short, the devil is in the details.[230]

If we can agree that the details are in fact the relevant zone of inquiry and scrutiny, then that alone would be an important step forward in the affirmative action debate.

CONCLUSION

The basic arithmetic of selective admissions is an essential component of any conceptual framework for judging the fairness of affirmative action. Although *Bakke* paints a compelling portrait of unfairness, it is but one part of a more complicated picture. As it turns out, it is one small part that does not faithfully capture Bakke's own circum-

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229. In response to the University of Georgia's contention that its high volume of applications precludes personalized review of each one, the Eleventh Circuit said:

> The rejoinder to this is obvious: if UGA wants to ensure diversity through its admissions decisions, and wants race to be part of that calculus, then it must be prepared to shoulder the burden of fully and fairly analyzing applicants as individuals and not merely as members of groups when deciding their likely contribution to student body diversity.

Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1256 (11th Cir. 2001).

230. Wessman v. Gittens, 160 F.3d 790, 797-98 (1st Cir. 1998). Citing concerns similar to those raised by the Eleventh Circuit in *Johnson*, the First Circuit in *Wessman* invalidated the Boston Latin School's affirmative action policy on the ground that it "focuses exclusively on racial and ethnic diversity." *Id.* at 798.

stances or the circumstances of the vast majority of unsuccessful white applicants. Stripped of the causation fallacy, the conventional affirmative action narrative unravels into several narratives, each shaped by the application of a particular admissions policy to the attributes and qualifications of a particular applicant. Without careful attention to the mechanics of affirmative action, it is easy to lapse into the polarizing terms of common discourse — minorities versus whites, qualified versus unqualified — even as those terms exaggerate the degree of racial conflict in selective admissions and ignore the utter irrelevance of race in the evaluation of large numbers of white applicants.

Justice Powell is no doubt correct that "there are serious problems of justice connected with the idea of preference itself."[231] Eventually, when the Supreme Court revisits *Bakke*, it may well determine that the problems of justice are so serious that racial preferences must end. On the other hand, it may endorse Justice Powell's compromise, or it may even develop an alternative. Whatever the Court decides, it will face the task of characterizing and explaining precisely what the problems of justice are. That explanation might begin with an acknowledgment that *Bakke*, as a story about what happens to white applicants in race-conscious admissions, is more fiction than fact. For it is only by purging the causation fallacy from our legal and moral discourse on racial preferences that we may reach a principled conclusion about the ultimate fairness of affirmative action.

APPENDIX

TABLE A. As discussed in Part II.B,[232] one method of estimating race-neutral admission rates is to calculate the overall percentage of applicants (black or white) who received an offer of admission within each SAT interval. In order to perform this calculation, we must know the total number of applicants and the total number of admittees within each SAT interval. Figure 2.5 of *The Shape of the River* compares the probabilities of admission by SAT interval for 1989 black and white applicants to the five selective institutions for which Bowen and Bok had the most detailed admissions data.[233] That figure does not show the actual numbers of white and black applicants and admittees within each SAT interval. In response to a written request,[234] however, the Mellon Foundation informed me that in 1989 the five institutions received a total of 24,700 applications from whites and 2200 applications from blacks. The foundation also provided me with data showing

231. *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

232. *See supra* text accompanying notes 122-124.

233. The graph appears in the text accompanying note 89, *supra*.

234. *See* Personal correspondence with James L. Shulman, Financial and Administrative Officer, Andrew W. Mellon Foundation (May 23, 2000) (on file with author).

the percentages of white and black applicants falling within each SAT interval. Those percentages appear in Table A, lines 1 and 3. Data from the foundation also specify the precise values of the black and white admission probabilities depicted in figure 2.5. Those probabilities appear in Table A, lines 6 and 8.

Curiously, the foundation's estimate of 2200 applications from blacks is slightly lower than Bowen and Bok's published estimate that the five institutions received "[m]ore than 2,300 applications" from black applicants.[235] I alerted the foundation to this discrepancy and requested the exact totals or, alternatively, the actual values of the numerators and denominators used to calculate the black and white probabilities of admission in Figure 2.5, but the foundation denied my request for this data.[236] Faced with this ambiguity, I have estimated the number of applications from blacks at 2400 in order to provide the most generous assessment of the displacement effect caused by affirmative action. Because the 2400 figure is almost surely too large,[237] my calculations err on the side of overestimating the displacement effect.

Using these data, it is possible to calculate the number of black and white applicants and admittees within each SAT interval and, in turn, the overall race-neutral rate of admission. For example, 11.4% of white applicants and 10.2% of black applicants scored within the 1200-1249 interval (*lines 1 and 3*) This comes out to 2816 whites (11.4% of 24,700) and 245 blacks (10.2% of 2400) (*lines 2 and 4*), for a total of 3061 applicants in that SAT interval (*line 5*). Among these applicants, 19.3% of whites and 60.0% of blacks were admitted (*lines 6 and 8*). This comes out to 543 white admittees (19.3% of 2816) and 147 black admittees (60.0% of 245) (*lines 7 and 9*), for a total of 690 admittees (*line 10*). Thus the overall rate of admission, regardless of race, is 22.5% (690 divided by 3061) (*line 11*). This method of calculation produces the results in Table A.

235. *See* BOWEN & BOK, *supra* note 8, at 18.

236. *See* Personal Correspondence with James L. Shulman, Financial and Administrative Office, Andrew W. Mellon Foundation (July 11, 2000) (on file with author).

237. If the number had exceeded 2400, then presumably Bowen and Bok would have said that the five institutions received "more than 2400 applications" from black applicants.

APPENDIX—TABLE A

SAT interval

	<1000	1000-1049	1050-1099	1100-1149	1150-1199	1200-1249	1250-1299	1300-1349	1350-1399	1400-1449	1450-1499	1500+
1. Percentage of black applicants in each SAT interval	.276	.096	.112	.111	.112	.102	.091	.050	.031	.013	.005	.001
2. Number of black applicants (line 1 x 2400)	662	230	269	266	269	245	218	120	74	31	12	2
3. Percentage of white applicants in each SAT interval	.043	.024	.038	.061	.084	.114	.137	.157	.143	.112	.061	.026
4. Number of white applicants (line 3 x 24,700)	1062	593	939	1507	2075	2816	3384	3878	3532	2766	1507	642
5. Total number of applicants (line 2 + line 4)	1724	823	1208	1773	2344	3061	3602	3998	3606	2797	1519	644
6. Percentage of blacks admitted	.170	.354	.406	.462	.555	.600	.739	.646	.800	.696	.750	1.00
7. Number of blacks admitted (line 6 x line 2)	113	81	109	123	149	147	161	78	59	22	9	2
8. Percentage of whites admitted	.033	.096	.124	.133	.187	.193	.226	.250	.307	.399	.511	.630
9. Number of whites admitted (line 8 x line 4)	35	57	116	200	388	543	765	969	1084	1104	767	405
10. Total number of admittees (line 7 + line 9)	148	138	225	323	537	690	926	1047	1143	1126	776	407
11. Percentage of all applicants admitted (line 10 ÷ line 5)	.086	.168	.186	.182	.229	.225	.257	.262	.317	.403	.511	.632

TABLE B. Also as discussed in Part II.B,[238] the race-neutral admission rates calculated in Table A do not account for the increase in yield for black applicants likely to result from the elimination of racial preferences. Under a race-neutral process in which black and white applicants with comparable SAT scores are admitted at the same rate, one would expect black admittees to accept offers of admission at the same rate as white admittees. Failing to take this factor into account produces an overestimate of the race-neutral admission rate. To see this clearly, suppose, for example, that 800 white and 200 black applicants (1000 total) with comparable SAT scores have respective admission rates of 25% and 50%. Suppose further that white admittees accept offers of admission 50% of the time, whereas black admittees accept only 30% of the time. Under this scenario, 200 white applicants and 100 black applicants (300 total) are admitted, and 100 white admittees and 30 black admittees (130 total) accept offers of admission. The methodology for Table A would estimate the race-neutral admission rate to be 30% (300 divided by 1000), with 240 whites and 60 blacks (300 total) admitted under a race-neutral process. On the reasonable assumption that the black yield would move up toward the white yield of 50% in the absence of racial preferences, however, only 260 applicants would need to be admitted in order to generate 130 acceptances. Thus the yield-adjusted race-neutral admission rate is 26% (260 divided by 1000), with 208 whites and 52 blacks (260 total) gaining admission.

This method of adjusting for yield produces the race-neutral admission rates in Table B. The black and white yield values (lines 1 and 4) are taken from Figure 2.9 of *The Shape of the River*.[239]

238. *See supra* text accompanying notes 125-136.

239. BOWEN & BOK, *supra* note 8, at 34 fig.2.9.

APPENDIX—TABLE B

SAT interval

	<1000	1000-1049	1050-1099	1100-1149	1150-1199	1200-1249	1250-1299	1300-1349	1350-1399	1400-1449	1450-1499	1500+
1. Black yield	.418	.309	.385	.379	.375	.319	.313	.306	.214	.188	.222	.000
2. Number of blacks admitted (same as Table A, line 7)	113	81	109	123	149	147	161	78	59	22	9	2
3. Number of blacks matriculated (line 1 x line 2)	47	25	42	47	56	47	50	24	13	4	2	0
4. White yield	.593	.633	.594	.536	.554	.534	.543	.522	.491	.458	.441	.364
5. Number of whites admitted (same as Table A, line 9)	35	57	116	200	388	543	765	969	1084	1104	767	405
6. Number of whites matriculated (line 4 x line 5)	21	36	69	107	215	290	415	506	532	506	338	147
7. Total number of matriculants (line 3 + line 6)	68	61	111	154	271	337	465	530	545	510	340	147
8. Yield-adjusted number of admittees (line 7 ÷ line 4)	115	96	187	287	489	631	856	1015	1110	1114	771	404
9. Total number of applicants (same as Table A, line 5)	1724	823	1208	1773	2344	3061	3602	3998	3606	2797	1519	644
10. Yield-adjusted admission rate (line 8 ÷ line 9)	.067	.117	.155	.162	.209	.206	.238	.254	.308	.398	.508	.627